TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 195.

GEORGE W. PILE, PLAINTIFF IN ERROR,

vs.

RICHARD S. HARDESTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 29, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States in and for the western district of Pennsylvania, entered at No. 2 May term, 1882, wherein Richard Hardesty is plaintiff and George W. Pile is defendant, may be found the following words and figures, to wit:

Appearance. Docket Entries.

RICHARD HARDESTY, a Citizen of the State of Maryland,
vs.
GEORGE W. PILE, a Citizen of the State of Pennsylvania.

Weir & Gibson. Geo. W. Guthrie. W. M. Hall.

MAY 25, 1882.

Defendant's bill of costs taxed as per taxation filed in No. 3 M., 1882.

H. D. GAMBLE, *Clerk.*

Precipe filed November 18, 1881. Summons trespass *vi et armis de bonus asportatus* issued November 19, 1881, returnable first Monday of December next; declaration filed with precipe. 1881, November 29, service of summons accepted for defendant by George W. Guthrie, Esq., attorney for defendant. Mar., $2.50. 1882, February 6, plea of defendant filed. 1882, April 25, rule for a commission to William H. Jack, at Natchitoches, parish of Natchitoches, State of Louisiana, to take depositions on part of plaintiff; interrogatories filed with proof of service of rule and interrogatories on de-
2 fendant. 1882, May 1, defendant having waived the filing of cross-interrogatories herein, the above commission is this day mailed to commissioner nominated. 1882, May 10, trial of above case continued at cost of pl'ff; same day defendant's bill of costs filed. 1882, May 11, notice of taxation of costs of defendant given for May 13, 1882, at 10 a. m., given counsel. 1882, May 13, exceptions to defendant's costs filed. 1882, May 20, deposition taken under commission issued to Wm. H. Jackson received; notice given counsel per notice filed. 1882, May 25, costs taxed as per margin. 1882, October 19, rule entered on behalf of defendant for commission to issue to A. T. Aukney, at Minneapolis, Minnesota, to take depositions and interrogatories and cross-interrogatories filed, and same day commission issued to commissioner nominated. 1882, November 10, depositions *de bene esse* — plaintiff taken before Murray Hanson filed. 1882, November 20, the above case called for trial and jury sworn and trial proceeded with. November 21, trial proceeded with. Nov. 22, trial proceeds. November 23, trial proceeds. November 24, trial proceeds. November 25, jury return a verdict for plaintiff and against defendant for the sum of thirteen thousand six hundred and forty ($13,640.00) dollars, interest included. H. D. Gamble, clerk. 1882, November 25, defendant's bill for wit-
3 ness McCaleb filed. Same day depositions taken pursuant to commission issued to A. T. Aukney, for defendant, filed;

also, same day, notice of taxation of costs for Tuesday next, at 10 a. m., with acceptance of service of same, filed. 1882, November 27, exceptions to plaintiff's bill of costs filed. 1882, November 27, motion and reasons for a new trial allowed to be and same filed. 1882, November 27, plaintiff's offers, plaintiff's points and answers, defendant's points and answers, and charge of the court filed. 1883, February 21, motion for a new trial argued, *c. a. v.* 1883, March 21, opinion of the court by Acheson, D. J., filed, and motion for a new trial overruled and judgment directed to be entered upon the verdict, and judgment accordingly. H. D. Gamble, clerk. 1883, April 2, application for writ of error herein, with bond presented, and same directed to be filed. 1883, April 3, exceptions by plaintiff to defendant's application for writ of error filed. 1883, April 14, affidavits of G. F. Baer and C. Long filed. 1883, April 17, statement of George W. Pile, withdrawing objections, made in his name to the allowance of writ of error filed. 1883, April 17, exceptions to application for writ of error overruled and writ of error returnable second Monday of Oc-
4 tober next at a Supreme Court of the United States to be held at the city of Washington, D. C., together with a citation to plaintiff herein, returnable on a like day with the writ of error, signed and filed; bond on writ of error approved by the court. 1883, June 5, citation served personally and by copy upon H. W. Weir, Esq., attorney for plaintiff. 1883, August 1, bill of exceptions duly signed and sealed by M. W. Acheson, J., holding circuit court, filed.

5 *Precipe for Summons and Narr.*

In the Circuit of the United States for the Western District of Pennsylvania.

RICHARD HARDESTY, a Citizen of the State of Maryland,
vs.
GEORGE W. PILE, a Citizen of the State of Pennsylvania.

Issue summons trespass *vi et armis de bonus asportatus*, returnable first Monday of December, 1881.

WEIR & GIBSON,
Pl'ff's Att'ys.

UNITED STATES, *ss:*

George W. Pile, a citizen of the State of Pennsylvania, the defendant in this suit, was summoned to answer Richard Hardesty, a citizen of said State of Maryland, the said plaintiff in this suit, of a plea of trespass. And thereupon the said plaintiff, by Weir & Gibson, his attorneys, complains against the said defendant for that the said defendant, on or about the second day of January, 1879, within the jurisdiction of this court, with force and arms, seized, took, and car-
ried away certain goods and chattels, to wit, one steam-en-
6 gine used for transportation of passengers and freight on railroads, one railroad coach used for the transportation of passengers on railroads, one coach used for the transportation of freight

and passengers on railroads, and two gondola cars used for transportation of freight, etc., then and there being the property of the said plaintiff, of great value, to wit, of the value of twenty-five thousand dollars of lawful money of the United States, and converted and disposed of the same to his own uses, and other wrongs to the said plaintiff then and there did commit, to the great damage of said plaintiff.

Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of thirty thousand dollars, and thereupon brings this suit.

WEIR & GIBSON,
Plaintiff's Attorneys.

Indorsed: No. 2. May term, 1882. Richard Hardesty, a citizen of the State of Maryland, *vs.* George W. Pile, a citizen of the State of Pennsylvania. *Precipe* and narr. in trespass. Filed Nov'r 18, 1881. W. & G.

7 *Summons.*

UNITED STATES, } *sct:*
Western District of Pennsylvania, }

The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

We command you that you summon George W. Pile, a citizen of the State of Pennsylvania, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburgh on the first Monday of December next, to answer to Richard S. Hardesty, a citizen of the State of Maryland, in an action of trespass *vi et armis de bonus asportatus*; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 19th day of November, A. D. 1881, and in the 106th year of the Independence of the said United States.

[SEAL.] H. D. GAMBLE, *Clerk.*

Indorsed: No. 2. May term, 1882. Circuit court of the
8 United States. Richard S. Hardesty *vs.* George W. Pile. Summons. Marshal, $2.50. Weir & Gibson, attorneys for plaintiff. November 29, 1881. Service accepted. George W. Guthrie, att'y for def't. Nov. 29, 1881. Service accepted by Geo. W. Guthrie, Esq., att'y for def't. John Hall, U. S. marshal.

9 *Plea.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

R. S. HARDESTY
vs.
GEO. W. PILE. } No. 2.

And now, to wit, Feb'y 6, 1882, defendant pleads "not guilty."

GEORGE W. GUTHRIE,
Att'y for Def't.

Indorsed: No. 2. May term, 1882. Circuit court of the United States, western district of Pennsylvania. Hardesty *vs.* Pile. Plea. Filed January 6, 1882.

9½ *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

RICHARD S. HARDESTY
vs.
GEORGE W. PILE. } No. 2.

Nov. 20, 1882.—The above case called for trial and jury sworn, viz: George H. Webb, Alex. Bingham, John W. Speddy, T. S. O'Neill, P. H. Buck, John C. Calhoun, Wm. Pentz, Michael Woods, George W. Cleis, Charles H. Johnston, Samuel G. Brotherton, Collin Soper, twelve good and lawful men, who were duly summoned and empanneled, &c. Whereupon case was opened by counsel, and evidence proceeded with from day to day, and after arguments of counsel were concluded the court charged the jury, who retired to consult, &c.; and on Nov. 25 the jury, having agreed upon a verdict, return and find for the plaintiff in the sum of thirteen thousand six hundred and forty ($13,640) dollars, interest included.

H. D. GAMBLE, *Clerk.*

10 *Offers and Objections.*

A.

A. H. Coffroth on the stand.

Defendants propose- to cross-examine the witness as to the manner he and his colleagues, who borrowed the money from Hardesty, and placed bonds of the railroad Co. as collateral, acquired title to the bonds.

Objected to.

Objections overruled and bill sealed for pl'ff.

M. W. ACHESON.

B.

A. H. Coffroth on the stand.

The witness having stated that $24,000 2nd-mortgage bonds were issued by the company and given to the treasurer, the defendants now propose- to ask "How did those bonds get out of the treasurer's possession?"

1. Objected as not proper cross-examination.

2. Objected on [to] the further ground of irrelevancy and incompetency.

Objections overruled and bill sealed for pl'ff.

M. W. ACHESON.

C.

John H. Uhl on the stand.

Pl'ff proposes to prove by this and other witnesses that at
11 the first meeting of the board of directors of the S. & M. Pt. R. R. Co., after the property in dispute had been put upon the road, the president of the board, A. H. Coffroth, stated to the board that the three individuals, Coffroth, Uhl, and Sanner, had purchased the rolling-stock and owned it as individuals, and that they would allow said Co. to use it by paying a reasonable rent therefor, and that the amount of the rent should be the interest on the money they had invested in the rolling-stock and the amount it would take to keep it in good repair, and that at subsequent meetings of the board, and at all times thereafter until its seizure by the def't, it was uniformly recognized by said board of directors to be the individual property of said Coffroth, Uhl, and Sanner.

Defendant objects:

1. Because the offer does not disclose the names of the members of the board to whom this statement was made, nor does it offer to show that any contract was made between the corporation and Sanner, Uhl, and Coffroth. The declarations of an officer at a meeting of the board are not evidence of a contract.

2. That the offer to show a uniform recognition by the board is too indefinite. It does not propose to show any corporate act
12 by the board.

Objections overruled and bill sealed for defendant.

W. W. ACHESON.

D.

John H Uhl, witness, on the stand.

Counsel for plaintiff propose to prove by the witness that the judgment of $2,500 in favor of the First National Bank of Connellsville and against A. H. Coffroth and John H. Uhl to No. 17 of Nov. term, 1878, in the U. S. C. C. has been satisfied—this for the purpose of enabling the jury in this case to fix the amount of damages, if they find in favor of the plaintiff.

Counsel for def't objects to proof of any payment made after the

date of the assignment to plaintiff in this case or after the acts complained of in the narr. filed in this case.

Objection sustained, evidence rejected, and bill sealed for plaintiff.

M. W. ACHESON.

Indorsed: No 2. May term, 1882. Richard Hardesty *vs.* George W. Pile. Offers and objections. Filed Nov'r 27, 1882.

13 *Plaintiff's Points and Answers.*

HARDESTY *vs.* PILE.

1. That if the jury find from all the evidence that Coffroth, Uhl, and Sanner purchased the rolling-stock in controversy—individually gave their personal obligations or promissory notes for the price, and that, in pursuance thereof, the property was delivered to them, then and in that event the title and actual possession of the said rolling-stock vested in them as individuals and not in the Somerset and Mineral Point Railroad Company.

Answer. This point is affirmed.

2. That if the jury further find that Coffroth, Uhl, and Sanner allowed or permitted the Somerset and Mineral Point Railroad Company to use the rolling-stock in controversy on their road for a certain compensation, in the way of rent, and that they reserved the right to take possession of it at the time they saw proper, they did not thereby make the property liable to the debts of the old company secured by the first mortgage.

Answer. This point is affirmed.

14 3. That if the jury further find that Coffroth and Uhl transferred the rolling-stock to Hardesty, the plaintiff, in the writing of Nov. 20, 1878, *bona fide*, Hardesty thereby acquired all the right, title, and interest of, in, and to the property that Coffroth and Uhl had at the date of said transfer, and thereby became invested with all their rights to take immediate possession.

Answer. This point is affirmed.

4. That if the jury further find from the evidence that the locomotive and cars described in the sheriff's levy are the same property now in controversy, then and in that event the return of the sheriff, indorsed on the writ, is conclusive evidence that he took the possession and control of the property so levied upon Dec. 16, 1878.

Answer. The return is conclusive evidence against the defendant that he seized the engine and cars mentioned in the levy.

5. That if the jury further find that Hardesty, the plaintiff, was the *bona fide* owner of the property on the 16th Dec., 1878, at the time of the levy mentioned in the 4th point, and then had the right to take immediate possession, the levy made by the defendant was a trespass, and the plaintiff is entitled to sustain this action.

Answer. This point is affirmed.

6. That if the jury find that the engine was taken away by direction of the First National Bank of Connellsville, the assignee of

Bailey & Co.'s alleged right under the agreement of Nov. 8,
15 1877, between Coffroth & Uhl and Bailey & Co., after it was in custody of the sheriff, by virtue of his levy, it was an unlawful act, and the said bank took nothing, by virtue of said unlawful act, under their alleged right by virtue of the aforesaid agreement of Nov. 8, 1878.

Answer. This point is affirmed.

7. That the depositing with Hardesty of a portion, to wit, $10,000, of the second-mortgage bonds set apart for the use of the new company, in the manner testified to by the plaintiff and his witnesses, as collateral security for the individual debt of Coffroth, Uhl, and Sanner, was not such a sale of them as was contemplated by the resolutions of the board of directors, in pursuance of which they were issued; and this act did not transfer the ownership of the property in dispute from Coffroth, Uhl, and Sanner to the Somerset and Mineral Point Railroad Company.

Answer. This point is affirmed.

Indorsed: No. 2. May term, 1882. Hardesty *vs.* Pile. Pl'ff's points and answers of the court thereto. Filed Nov'r 27, 1882.

16 *Defendant's Points.*

1. That as the sheriff levied on and sold the right, title, interest, claim, and demand of the railroad Co. in the railroad and its property, including the rolling-stock, if the jury believe that the use and possession of the rolling-stock and the operations of the road was not interfered with, the mere locking of the cars to prevent their removal from his bail-wick after the locomotive had been so removed (an injunction having issued to prevent their removal), did not constitute him a trespasser.

2. That the agreement of 8 Jan., 1879, under which the possession of this rolling-stock was decreed by the court to be delivered to the purchaser at sheriff's sale, estops the plaintiff from suing the sheriff in trespas- *vi et armis.*

3. That if the jury believe that Hardesty did not take possession of the rolling-stock and had no possession at the time of sale, and that he did not have the appraisement made to fix the price and never credited Coffroth, Uhl, and Sanner with anything on account of this transfer and has since taken judgment against them without any credit, then the plaintiff had no such right of possession at the time of sale as will enable him to maintain this action.

4. If the jury believe from the evidence in the case that
17 the assignment to Hardesty was not executed and delivered to him until after the levy by the defendant, then there can be no recovery in this case.

5. If the jury believe from the evidence that the rolling-stock in controversy was purchased to be used on the line of the Somerset and Mineral Point road, and that the possession of the same was delivered to the company upon an agreement that the same should become the property of the company and be transferred to it as soon

as the bonds of said Co. should have been sold and the money realized therefrom, that this was not a bailment, but a conditional sale, and that any agreement that the title should remain in Coffroth, Uhl, and Sanner until the sale of said bonds was void against creditors, and the plaintiff cannot recover in this action.

6. If the jury believe from the evidence that the rolling-stock was put upon the line of the S. & M. *R.* R'd Co., and marked with the name of said Co., and was in its possession and use at the time of the levy, and that the sheriff did not know that the same belonged to Hardesty and that he had any claim thereto, an action of trespass will not lie against him, even though he took possession of the same for any act which he may have committed before notice of such claim, and if they find from the evidence that notice of such
18 claim was not given to the sheriff until the day of the sale, and that thereafter the defendant merely sold the interest of the defendant in the rolling-stock, that this plaintiff cannot recover in this action.

7. If the jury believe from the evidence that the rolling-stock in controversy was delivered to the S. & M. P. R'd Co. upon an agreement that they should have the use and possession of the same, paying therefore the interest on the purchase-money and expenses incurred for repairs thereon, and that after the assignment to the plaintiff in this case he did not take possession of the same, but, on the contrary, instructed his agent to permit the Co. to have the use and possession thereof as long as he considered it safe, and that the acts of the defendant complained of in this case were committed before any termination of such arrangement and while the rolling-stock was still in the use and possession of the company, that then there can be no recovery in this case.

8. That if the jury believe the defendant never took possession of the locomotive and gondolas, and that the locomotive was not in his bail-wick at the time of sale of the road and its property, and that he merely sold the interest of the defendant Co. and did not
19 deliver possession to the purchaser, the pl'ff cannot recover damages for them.

9. That if the jury believe that the rolling-stock was purchased by Coffroth, Uhl, and Sanner on their individual responsibility, but surrendered the possession to the company, and the company used the property on its road with the marks of co-ownership on them, and the money of the corporation was used to pay the rolling-stock or part of it, and that Sanner, Uhl, and Coffroth so reported under oath to the State authorities, and further reported the rolling-stock as belonging to the company, then the transfer of Coffroth & Uhl to Hardisty passed no title.

10. If the jury believe the company issued a second mortgage, which was to be a lien upon the rolling-stock acquired by the company, and issued the bonds under the mortgages, and that $24,000 of these bonds were to be and to pay the indebtedness *of* Coffroth, Sanner, and Uhl had incurred in the purchase of the rolling-stock, and thereafter Coffroth, Sanner, and Uhl took these bonds and — them, then the bonds became a debt of the Co. and extinguished the

20 claim of Coffroth, Uhl, and Sanner, and the plaintiff acquired no such title by the transfer of 20 Nov., 1878, as will enable him to maintain this suit, and the verdict must be for defendant.

Indorsed: No. 2. May term, 1882. Richard Hardesty *vs.* George W. Pile. Defendant's points. Filed Nov. 27, 1882.

21 *Answers to Defendant's Points.*

1st point. This point is refused.

2 point. This point is refused.

3 point. This point is refused. The jury will determine from all the evidence in the case whether the plaintiff had the right to the immediate possession of the rolling-stock in question.

4th point. This point is affirmed as a naked proposition and I leave the question of fact raised by the point to you, but I deem it my duty to add that I, myself, think the clear weight of the evidence is with the plaintiff upon the matter covered by the point.

5th point. If the rolling-stock was purchased by the company, or by Coffroth, Uhl, and Sanner for the company, and the transaction was simply as stated in this point, then it was a conditional sale and not a bailment, and with this explanation and qualification this point is affirmed; but if the rolling-stock was purchased by Coffroth, Uhl, and Sanner as individuals and for themselves, and they gave their personal obligations for the price and subse-
22 quently delivered the rolling-stock to the company upon the terms testified to by them, the transaction was not a conditional sale, but a bailment, and the right of property remained in Coffroth, Uhl, and Sanner.

6th point. This point is refused.

7th point. This point is affirmed if the jury find that it sets forth the whole arrangement under which the rolling-stock was delivered to the railroad company; but if the jury find that Coffroth, Uhl, and Sanner reserved the right to take possession of it at any time they saw proper there may be a recovery in this action.

8th point. This point is refused.

9th. If the jury believe from the evidence that Coffroth, Uhl, and Sanner, as individuals, purchased the rolling-stock for themselves and gave their personal obligations for the price and delivered the rolling-stock to the railroad company to be used on the road, the other facts set forth in this point are not inconsistent with Coffroth, Uhl, and Sanner's ownership of the rolling-stock.

10th point. This point is refused.

Indorsed: No. 2. May term, 1882. Richard S. Hardesty *vs.* George W. Pile. Court's answers to the defendant's points. Filed Nov'r 27, 1882.

23 *Charge of the Court.*

United States Circuit Court. May Term, 1882.

RICHARD S. HARDESTY
vs.
GEORGE W. PILE. } No. 2.

GENTLEMEN OF THE JURY:

This is an action of trespass brought by Richard S. Hardesty, a citizen of Maryland, against George W. Pile, late sheriff of Somerset county, Pennsylvania, to recover damages for the alleged illegal seizure and sale of certain personal property, to wit, a locomotive engine, one passenger car, one baggage car, and two gondola cars, which prior to the alleged trespass had been in use and *was* then in use upon the Somerset and Mineral Point railroad, in Somerset county, Pennsylvania, the title to which personal property, with the right to the immediate possession thereof, the plaintiff claims was in him at the time of the commission of the acts complained of.

The railroad named was constructed some time prior to the year 1874 by an incorporated company called "The Somerset and Mineral Point Railroad Company," which executed two mortgages
24 upon its railroad, one for $50,000, dated June 30, 1871, and one for $30,000, dated January 22, 1872.

The trustee named in the second of these mortgages, pursuant to authority therein contained, sold the railroad on the 1st day of December, 1874, to A. H. Coffroth for the sum of $22,050, and executed to him a deed for the road on January 19, 1875.

Immediately after his purchase Coffroth sold and transferred one-third of the railroad to John H. Uhl and one-third thereof to Michael A. Sanner.

These three persons, on Feb'r. 8, 1875, met and organized a new corporation pursuant to the act of Assembly of April 8, 1861, and the supplementary act of Feb'r. 19, 1867.

Something was said by counsel, in the course of the argument to the jury, about supposed irregularities connected with the organization of the new company, but with such irregularities, if any existed, we have nothing to do in this case. It must be conclusively assumed here that the proceedings were *ir*regular and the new corporation legally created.

The name adopted by the new company was the same as that of the old company, viz., "The Somerset and Mineral Point Railroad Company;" but these companies, while bearing the same name, were distinct corporations. The sale of the railroad did not ex-
25 tinguish the old corporation; it did not merge in the new company; the companies were two distinct coexistent bodies corporate.

The new company took the railroad subject to the lien of the first mortgage for $50,000, but the old company remained legally liable for its bonded debt secured by that mortgage.

It appears from the uncontradicted evidence that the old company never owned any rolling-stock. It had operated its road by

means of rolling-stock leased from the Pennsylvania Railroad Company, and Coffroth acquired no rolling-stock by virtue of his purchase from the mortgage trustee.

After the organization of the new company the rolling-stock, which is the subject of this controversy, was purchased.

And here—to guard the jury from possible misapprehension—it is proper for me to say that the $50,000 mortgage of the old company, while a continuing lien upon the railroad itself, did not attach to or bind this newly acquired rolling-stock. Whether that rolling-stock belonged to the new company or to Coffroth, Uhl, and Sanner, as individuals, it was not bound for that mortgage debt.

26 The plaintiff claims and he has given evidence tending to show that the rolling-stock, the subject of this controversy, was purchased by Coffroth, Uhl, and Sanner individually and for themselves; that they gave their personal obligations for the price; that the rolling-stock was delivered to them and was their individual property; that they permitted the new company to use it upon the road for a compensation, but reserved to themselves the right to resume possession thereof at any time they saw proper to do so.

Whether this rolling-stock was the individual property of Coffroth, Uhl, and Sanner or was the property of the new railroad company—the corporation—is the fundamental question in this case.

If it belonged to the corporation the plaintiff, of course, cannot recover, for he claims title, not under the corporation, but under Messrs. Coffroth, Uhl, and Sanner. To whom, then, did this property belong?

The engine was built by Dawson & Bailey, and the deposition of George F. Dawson, of that firm, has been read to show that Dawson & Bailey constructed the engine under a contract with Coffroth, Uhl, and Sanner, as individuals, and received from them their individual notes for the contract price.

27 H. Clay Frick has testified that he sold the two gondola cars to John H. Uhl, and took for the price the individual paper of Sanner, with, he thinks, the names of Coffroth and Uhl on the paper.

A. H. Coffroth, John H. Uhl, and Michael A. Sanner have severally testified at length upon this whole subject, and they respectively state that this rolling-stock was purchased, paid for, and owned by them individually, and that it was used by the corporation under the arrangement alleged by the plaintiff.

Peter Heffly and Noah Roberts, who were directors of the new company, testify that, at the first meeting of the board of directors after the rolling-stock was acquired, Gen. Coffroth, who was the president of the company, stated to the board that the rolling-stock belonged to Coffroth, Uhl, and Sanner, and the terms upon which they were willing the company should have the use of it, and these two witnesses add that they understood the rolling-stock was the individual property of Coffroth, Uhl, and Sanner, and was used by the company under the alleged arrangement.

Upon this branch of the case the defendant places great reliance

upon certain minutes of the company upon which counsel have commented, the action of the railroad company and of Cof-
28 froth, Uhl, and Sanner in respect to the new company's mortgage for $45,000 and the bonds intended to be secured thereby, a report by Gen. Coffroth, as president of the company, to the stockholders, and several annual reports—four in number—made by the officers of the company to the auditor general; and it is strenuously insisted by the defendant's counsel that the acts of the company and of Coffroth, Uhl, and Sanner, and the statements made in the documents referred to, are inconsistent with the plaintiff's theory as to the ownership of the rolling-stock and contradictory of the testimony of Messrs. Coffroth, Uhl, and Sanner. All this, however, is denied by the plaintiff's counsel.

The counsel on both sides have discussed the evidence at great length, and you have had the benefit of their respective views. I content myself, therefore, with referring to it in the general way in which I have spoken of it.

What credit shall be given to the witnesses it is for the jury to determine. If any of them have any personal interest in the controversy that is a matter which may go to their credibility and is for your consideration. You have seen and heard the witnesses, and it is for you to say whether they have testified truly or falsely.
29 Upon the whole evidence in the case you will determine whether the ownership of the property in question was in the corporation or in Coffroth, Uhl, and Sanner.

The plaintiff claims title under the latter.

It is shown, if the testimony is believed (and it is uncontradicted), that these persons borrowed from the plaintiff a large sum of money—from $13,000 to $15,000—for which they gave him their bond. It is testified that this money so borrowed from the plaintiff, or part thereof, was applied by Coffroth, Uhl, and Sanner to pay their obligations given for this rolling-stock. There is evidence to show that on Nov. 20, 1878, Coffroth and Uhl (who it would seem had then succeeded to Sanner's rights) mailed to the plaintiff at Baltimore the writing in evidence, dated Nov. 20, 1878, whereby Coffroth and Uhl sold, transferred, and set over to the plaintiff this rolling-stock. That transfer, it is testified by the plaintiff, was made to and accepted by him "as further security behind their" (Coffroth, Uhl, and Sanner's) "bond."

Whatever rights these individuals had in this rolling-stock passed, by the paper of Nov. 20, 1878, to the plaintiff.

On Aug. 23d, 1878, John Roth, for use, brought suit against "The Somerset and Mineral Point Railroad Company" to
30 recover interest due upon the first-mortgage bonds issued by the original company, the old corporation. Judgment having been obtained, an execution issued and the writ of *fi. fa.* was put into the defendant's hands, he then being sheriff of Somerset county. In his proceedings under that writ the trespass complained of was committed. His return shows a levy made Dec. 16, 1878, upon a locomotive and cars, which the uncontradicted evidence shows to be the same described in the bill of sale of Nov. 20, 1878, from Coff-

roth and Uhl to the plaintiff, and if you find from all the evidence in the case that at the time of the levy the right of property in and to said rolling-stock was in the plaintiff, and that he had the right to the immediate possession thereof, the defendant was a trespasser and the plaintiff is entitled to recover damages.

The counsel for the respective parties have submitted prayers for instructions. These points, which I will now read and answer, seems to cover all possible views of which the case is susceptible.

(The court here read and answered points.)

The general effect of the answers to the points is such, you must perceive, as to bring you back to the fundamental question
31 suggested in the early part of this charge, viz., whose property was this rolling-stock immediately prior to the time of the sale and transfer to the plaintiff? Did it belong to the corporation or to Coffroth, Uhl, and Sanner? If it was the property of the corporation the plaintiff cannot recover; but if it belonged to Coffroth, Uhl, and Sanner, and they had the right to the immediate possession thereof, your verdict should be for the plaintiff, if you are satisfied the paper of Nov. 20, 1878, was executed and delivered to the plaintiff prior to the sheriff's levy, as the plaintiff and Coffroth and Uhl all testify was the fact.

It only remains for me to speak briefly upon the measure of damages. If you find in favor of the plaintiff your verdict ought to be for the fair value of the property at the date of the levy, and in assessing the damages it would be right to include interest on said value from the date of the levy until this date.

Indorsed: No. 2, May term, 1882. Richard S. Hardesty *vs.* George W. Pile. Charge of the court. Filed Nov'r 27, 1882.

32 *Motion & Reasons for New Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

R. S. HARDESTY
vs.
G. W. PILE. } No. —.

And now, to wit, November 27, 1882, defendant's counsel respectfully move the court for a new trial in above-entitled case for the following reasons, viz:

1st. Because the verdict is excessive under the evidence.

2nd. Because the court erred in charging the jury on the following points, viz:

1st. In relation to the effect of the action of Coffroth, Uhl, and Sanner in pledging a portion of the bonds secured by the mortgage for $45,000.00 as collateral security for their individual obligations.

2nd. In relation to the effect of the arrangement between the S. & M. P. R'd Co. and Coffroth, Uhl, and Sanner, as testified to by them.

3rd. In relation to the right of the plaintiff to recover under the

assignment dated Nov. 20, 1878, without testimony to show that he ever took or demanded possession or terminated the agree-
33 ment with the company for the use of the rolling-stock.

4th. In reference to the effect of the sheriff's return under the execution in his hands.

5th. In reference to the sheriff's liability for levying on the goods under the circumstances without notice of plaintiff's claim.

6th. In not affirming defendant's 1st, 2d, 3rd, 5th, 6th, 8th, 9th, and 10th points.

7th. In affirming plaintiff's 2nd, 3rd, 4th, 6th, and 7th points.

GEORGE W. GUTHRIE,
Att'y for Def'ts.

Indorsed: No. 2. May term, 1882. Hardesty *vs.* Pile. Motions and reasons for new trial. Nov. 27, 1882. Motion made in open court and ordered to be filed and placed on argument list. By the court. Guthrie.

34 *Additional Reasons for New Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HARDESTY *vs.* PILE.

And now, to wit, February 21, 1883, defendant's counsel ask leave to amend the motion for a new trial in above case by adding the following reason, viz:

That since the trial of the case defendant has found the original returns made by the Somerset & Mineral Point R'd Co. to the auditor general; that diligent search *were* made for same prior to the trial, but the officers of the State, in whose charge the same were, informed defendant's counsel that the same could not be found and they believed the same had been destroyed.

W. M. HALL,
Att'y for Def't.

Indorsed: Hardesty *vs.* Pile. Additional reasons for a new trial.

35 *Opinion on Motion for New Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

RICHARD S. HARDESTY
vs.
GEORGE W. PILE. } No. 2.

Sur motion on part of the defendant for a new trial.

Before McKennan, Cir. J., and Acheson, J.

ACHESON, *J:*

1. We cannot give our assent to the proposition that the rolling-stock in question was bound by the first mortgage of the first corpo-

ration. That company never owned any rolling-stock and none passed to the purchaser of the railroad at the sale under the company's second mortgage. The locomotive and cars were acquired after that sale and after the incorporation of the second company. Moreover, the jury have found that they were not the property of the second company, but were purchased and owned by Coffroth, Uhl, and Sanner; and that their title became vested in the plaintiff before the trespass complained of. It is true the first mortgage in terms covered the "future to be acquired" rolling-stock of the company, and, doubtless, it would have attached to engines and cars subse-
36 quently acquired by the mortgagor and placed upon the road. But none of the cases relied on by the learned counsel gives countenance to the notion that such mortgage grasps the rolling-stock of third persons temporarily used upon the railroad under a contract between them and a company subsequently operating the road. Such rolling-stock does not become fixed to and part of the railroad. United States *vs.* New Orleans R. R., 12 Wal., 362. It remains "loose property and susceptible of separate ownership." *Ibid.*, 365. Speaking of the rights of railroad mortgagees in after-acquired cars, Chief Justice Waite, in Fosdick *v.* Schall, 99 U. S., 251, said: "The mortgagees take just such an interest in the property as the mortgagor acquired—no more, no less." Here the mortgagor never had any interest in the locomotive and cars, and the verdict establishes that at the time of the sheriff's levy they were the individual personal property of the plaintiff.

2. But the defendants insists that it was error to hold that the sheriff's return to the writ of *fi. fa.* imported a seizure of the locomotive and cars. The return, after reciting demand and non-payment, proceeds in the words following: "And I have, therefore, by virtue of the same written writ, levied upon all the right, title, interest,
37 and claim of the Somerset and Mineral Point Railroad Company of, in, and to the Somerset and Mineral Point railroad in Somerset county and State of Pennsylvania, and upon all the property—real, personal, and mixed—including locomotive, cars, hand-cars, tools, engine-houses, depot, water station, siding, and switches, now in the regular use of the said Somerset and Mineral Point Railroad Company in the conducting of its business as a carrier, and the rights, franchises, privileges, and rights of way of said company incident, appurtenant, or in any wise appertaining or connected therewith, taken in execution as the property of the Somerset and Mineral Point Railroad Company at the suit of John Roth," &c.

This return is drawn with much precision, and we think admits of but one interpretation. While the seizure was of the right, title, and interest of the defendant in the execution in and to the described railroad as respects the "locomotive, cars," etc., "in the regular use" of the defendant "in the conducting of its business as a carrier," the levy, by very exact language, was upon the things themselves and not merely upon the defendant's interest therein. If, as is now claimed, the intention was simply to levy upon the right,
38 title, and interest of the defendant company in the railroad

and its appurtenances, together with the corporate franchises as an entirety, different phraseology would have been employed. We do not see how, under the terms of the levy, the plaintiff could have removed the locomotive and cars without defying the authority of the sheriff and becoming a trespasser against him. Welsh *v.* Bell, 32 Pa. St., 12. Our construction of the return is consistent with and is fully justified by the conduct of the sheriff. By the uncontradicted evidence it was shown that after the levy and before his sale he locked the wheels of the cars. It is idle to say that this was but to prevent the cars being run off in violation of an injunction in another proceeding. The sheriff had no process in his hands other than the writ of *fi. fa.* which gave him any color of authority to touch the cars.

If the construction given to the levy was correct the charge to the jury as to its effect was undoubtedly accurate. A levy by the sheriff upon the goods of a stranger to the execution is the exercise of dominion over them sufficient to constitute a trespass, though there be no actual taking or touching of the goods. Welsh *v.* Bell, *supra;* Wintringham *vs.* Lafoy, 7 Cow., 736; Miller *v.* Baker, 1 Met., 27.

And the sheriff's return that he levied is conclusive evidence
39 against him that he seized and took the goods into his possession. Welsh *vs.* Bell, *supra.* So, also, in Paxton *v.* Steckel, 2 Pa. St., 93, it was held that the sheriff's return "attached twenty-four pieces of iron, &c., in the possession of J. Stettler," subjected the sheriff to an action of trespass and was conclusive evidence against him.

It is, however, urged that constructive seizure is predicable only of a lawful execution and that there can be no such thing where the writ or levy is void. But if this be conceded we do not see how it helps the defendant. There is absolutely no foundation for the insinuation that the execution here was unlawful. It was the ordinary writ of *fieri facias* against a corporation. The counsel assume that under the Pensylvania statutes a levy upon the railroad and franchises of a corporation cannot be made under such a writ, but only upon an *alias* or *pluries* writ after a return of *nulla bona.* We do not know that this has been authoritatively decided and do not feel called on to express any opinion as to what is the corre-t practice. We incline to think that such levy made on the first *fi. fa.* would at the most be but an irregularity and by no means a nul-ity. But however this may be the writ here unquestionably authorized

the sheriff to levy on personal property, which he proceeded to
40 do, as his return clearly clearly shows, and the plaintiff's grievance is that the levy embraced his goods and chattels. Surely it is a poor answer for the sheriff to make that his levy as a whole was broader than his writ warranted.

3. The defendant contends that the court erred in refusing to charge that the agreement of Jan. 8, 1879, estopped the plaintiff from suing the sheriff in trespass. But if the construction which the defendant claims for that instrument be the true one it might well be doubted whether Messrs. Rupple & Hey, in their mere capacity of attorneys, could bind the plaintiff by their signature.

Holker *v.* Parker, 7 Cranch, 436; Gable *v.* Hain, 1 P. & W., 264; Willis *v.* Willis, 12 Pa. St., 159; Stokely *v.* Robinson, 34 Pa. St., 315. The agreement did not in any wise benefit the plaintiff and was made in an equity suit (as the basis of a decree therein) to which he was an entire stranger and in which he had no interest, nor had he any concern with the rule for an attachment for contempt, the pendency of which was the occasion of the agreement. Moreover, the defendant (the sheriff) was no party to that suit or to the agreement. It is, then, very questionable under the decisions whether Messrs. Rupple & Hey, without special authority so to do, could thus release or destroy the plaintiff's right of action against the defendant.

But the paper does not profess so to do, and we think it is not fairly open to a construction which would produce that result. The parties to the agreement were not dealing with any question between the plaintiff and the defendant. The main purpose in view
41 was to purge a contempt of court and secure a return of the locomotive which had been run off by Neumeyer and McCaleb under a claim of right, but in violation of an injunction. The sixth clause of the agreement declares: "The rights of R. S. Hardesty to any title or claim to the rolling-stock, if he has any legal right, shall be determined according to law. This agreement is not to prejudice any right he may have and which can be legally established to the rolling-stock." The whole paper is to be read in the light of the concluding paragraph of the preamble, viz: "And whereas it is desirable that the relative rights of all parties interested or concerned should be determined at law." This furnishes the key to the true intention of the parties. A consentable decree was to be entered in the equity suit and all parties left to their legal remedies. In our opinion it would be a perversion of the agreement to hold that it bars the plaintiff's action against the sheriff for his trespass.

4. Since the hearing of this motion I have carefully read the testimony bearing on the question of damages to see whether there is good reason for the allegation that the verdict is excessive under the evidence. Upon this branch of the case the plaintiff examined six witnesses and the defendant two. The two witnesses on the part of the plaintiff, who testified concerning the locomotive, not only had personal knowledge of its condition, but were machinists who for many years had been employed in the building of locomotives. They were quite as competent to testify as to value as were
42 the defendant's witnesses, so far as appeared. Deducting from the verdict the interest included therein would give $11,000 as the value the jury placed on the rolling-stock. As it consisted of a locomotive, one passenger car, a baggage car, and two gondola cars the valuation is not apparently extravagant and we have been furnished with no new evidence to show it to be excessive. It is a mistake to say that in respect to the damages the jury blindly followed the plaintiff's witnesses. The verdict would have been larger by $2,000 or $3,000 if the jury had adopted the minimum figures of those witnesses. In point of intelligence the jury was rather

above the average, and we are not convinced that the verdict did the defendant injustice.

What has been said covers the grounds for a new trial, which counsel most discussed. We do not think the other reasons assigned call for special remark. After a careful consideration of the whole case we are of opinion that the motion for a new trial should be overruled and judgment entered on the verdict.

And it is so ordered.

Indorsed: No. 2. May term, 1882. Richard S. Hardisty *vs.* George W. Pile. *Sur* motion for a new trial. Opinion of the court. Filed March 21, 1883.

43 *Judgment. Docket Entry.*

No.—2.
Term—May.
Year—1882.
Defendant—George W. Pile.
Plaintiff—Richard Hardesty.
Date of judg't—March 21, 1883.
Amount—$13,640.
Int. from—Nov. 25, 1882.
Costs—Unliquidated.

44 *Application for Allowance of Writ of Error & Bond.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

R. S. HARDESTY *vs.* GEO. W. PILE.

To the honorable the judges of the said court:

The def't, Geo. W. Pile, desires that the final judgment of the circuit court in the above case may be re-examined and reversed or affirmed in the Supreme C't upon writ of error. He, therefore, prays the allowance of a writ of error as provided by statute.

W. M. HALL,
Att'y for Def't.

Know all men by these presents that we, George F. Baer, of Reading, Pa.; Christian Long, of Shippensburg, Pa., and Wm. M. Hall, of Bedford, Penna., are held and firmly bound, jointly and severally, to R. S. Hardesty, the above plaintiff below and defendant in error, in the sum of twenty thousand dollars, upon condition that the plaintiff in error, Geo. W. Pile, shall prosecute his writ of error to effect, and if he fail to make his plea good shall assume all damages and costs.

Witness our hands and seals this 27th March, 1883.

WM. M. HALL. [SEAL.]
GEO. F. BAER. [SEAL.]
C. LONG. [SEAL.]

Taken and acknowledged as to W. M. Hall, before me, this 27 March, 1883.

[SEAL.] H. D. TATE,
Prothonotary.

45 As to Geo. F. Baer's signature—

[SEAL.] T. O. YARINGTON, JR.,
Notary Public.

As to C. Long's signature—

[SEAL.] JAMES KELSO,
Notary Public.

Indorsed: No. 2 May term, 1882. R. S. Hardesty *vs.* Geo. W. Pile. In the cir. c't of the U. S. Application for allowance of writ of error and bond. Filed April 2nd, 1883, by direction of the court. H. D. Gamble, clerk. April 17, 1883, the within bail in error approved by the court.

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, betweeen Richard S. Hardesty, a citizen of the State of Maryland, plaintiff, and George W. Pile, a citizen of Pennsylvania, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of April, A. D. 1883.

H. D. GAMBLE,
Cl'k U. S. C't C't.

Allowed by—
M. W. ACHESON.

[Endorsed:] Writ of error. Filed April 17, 1883.

46½ *Bill of Exceptions.*

In the United States Circuit Court for the Western District of Pa.
May Term, 1882.

R. S. HARDESTY
vs.
GEO. W. PILE. } No. 2.

And now, to wit, Nov. 22, 1882, at the trial of this case before the Honorable M. W. Acheson, district judge, holding the circuit court, and a jury duly chosen and sworn, the court charged the jury, as matter of law (*inter alia*), as follows, to which the defendant, by his counsel, excepts and prays that a bill of exceptions be sealed, to wit, as follows:

1st. The court charged the jury:

"Something was said by counsel in the course of the argument to the jury about supposed irregularities connected with the organization of the new company, but with such irregularities, if any existed, we have nothing to do in this case. It must be conclusively assumed here that the proceedings were regular and the new corporation legally created."

2nd. The court charged the jury:

"The name adopted by the new company was the same
47 as that of the old company, viz., The Somerset and Mineral Point Railroad Co. But these companies, while bearing the same name, were distinct corporations. The sale of the railroad did not extinguish the old corporation; it did not merge in the new company. The companies were two distinct coexistant bodies corporate."

3rd. The court charged the jury:

"The $50,000 mortgage of the old company, while continuing a lien upon the R. r'd itself, did not attach to or bind this newly-acquired rolling-stock."

4th. The court charged the jury:

"Upon this branch of the case the def't places great reliance upon certain minutes of the Co. upon which counsel have commented; the action of the R. R. Co. and of Coffroth, Uhl, and Sanner in respect to the new company's mortgage for $45,000 and bonds intended to be received thereby; a report of Gen'l Coffroth, as president of the company, to the stockholders, and several annual reports—four in number—made by the officers of the Co. to the auditor general; and it is strenuously insisted by the def't's counsel that the acts of the Co. and of Coffroth, Uhl, & Sanner, and the
48 statements made in the documents referred to, are inconsistent with the pl'ff's theory as to the ownership of the rolling-stock and contradictory of the testimony of Messrs. Coffroth, Uhl, and Sanner. All this, however, is denied by the pl'ff's counsel. The counsel on both sides have discussed the evidence at great length, and you have the benefit of their respective views. I content myself, therefore, with referring to it in the general way in which I have spoken of it."

5th. The court charged the jury:

"Whatever rights these individuals had in this rolling-stock passed by the paper of Nov. 20, 1878, to the pl't'ff."

6th. The court charged the jury in answer to def't's first point, which point is as follows:

That as the sh'ff levied on and sold the right, title, interest, claim, and demand of the railroad Co. in the railroad and its property, including the rolling-stock, if the jury believe that the use and possession of the rolling-stock and the operations of the road were not interfered with, the mere locking of the cars to prevent their removal from his bailiwick, after the locomotive has been so removed (an injunction having issued to prevent their removal), did
49 not constitute him a trespasser.

The answer to which was as follows:

"This point is refused."

7th. The court charged the jury in answer to def't's 2nd point, which point is as follows:

That the agreement of 8th Jan., 1879, under which the possession of this rolling-stock was decreed by the court to be delivered to the purchaser at sheriff sale, estops the pl'ff from suing the sheriff in trespass *vi et armis.*

The answer to which is as follows:

"This point is refused."

8th. The court charged the jury in answer to def't's 3rd point, which point is as follows:

That if the jury believe that Hardesty did not take possession of the rolling-stock and had no possession at the time of sale, and that he did not have the appraisement made to fix the price and never credited Coffroth, Uhl, and Sanner with anything on account of this transfer, and has since taken judgment against them without any credit, then the pl't'ff had no such right of possession at the time of sale as will enable him to maintain this action.

The answer to which was:

50 "This point is refused. The jury will determine from all the evidence in the case whether the pl't'ff had the right of immediate possession of the rolling-stock in question."

9th. The court charged the jury in answer to def't's 5- point, which point is as follows:

If the jury believe from the evidence that the rolling-stock in controversy was purchased to be used on the line of the S. & M. P't R. R., and that the possession of the same was delivered to the company upon an agreement that the same should become the property of the Co. and be transferred to it as soon as the bonds of the said Co. should have been sold and the money realized thereupon; that this was not a bailment, but a conditional sale, and that any agreement that the title should remain in Coffroth, Uhl, and Sanner until the sale of said bonds was void against creditors, *and* the pl't'ff cannot recover on this action.

The answer to which was as follows:

If the rolling-stock was purchased by the Co. or by Coffroth, Uhl, and Sanner for the Co., and the transaction was simply as stated in

this point, then it was a conditional sale and not a bailment, and with this explanation and qualification this point is affirmed.

51 But if the rolling-stock was purchased by Coffroth, Uhl, and Sanner as individuals and for themselves, and they gave their personal obligations for the price and subsequently delivered the rolling-stock to the company upon the terms testified to by them, the transaction was not a conditional sale, but a bailment, and the right of property remained in Coffroth, Uhl, and Sanner.

10th. The court charged the jury in answer to def't's 6th point, which point is as follows:

If the jury believe from the evidence that the rolling-stock was put upon the line of the S. and M. P. R'd Co. and marked with the name of said Co., and was in its possession and use at the time of the levy, and that the sheriff did not know that the same belonged to Hardesty and that he had any claim thereto, an action of trespass will not lie against him, even though he took possession of the same, for any act which he may have committed before notice of such claim; and if they find from the evidence that notice was not given to the sheriff until the day of the sale, and that thereafter the defendant merely sold the interest of the defendant in the rolling-stock, that then plaintiff cannot recover in this action.

52 The answer to which was as follows:

"This point is refused."

11th. The court charged the jury in answer to def't's 7th point, which point is as follows:

If the jury believe from the evidence that the rolling-stock in controversy was delivered to the S. and M. P. R'd Co. upon an agreement that they should have the use and possession of the same, paying thereupon the interest on the purchase-money and all expenses incurred for repairs thereon, and that after the assignment to the pl't'ff in this case he did not take possession of the same, but, on the contrary, instructed his agent to permit *to* the Co. to have the use and possession thereof as long as he considered it safe, and that the acts of the defendant complained of in this case were committed before any termination of such arrangement, and while the rolling-stock was still in the use and possession of the Co., that then there can be no recovery in this case.

The answer to which is as follows:

"This point is affirmed if the jury find that it sets forth the whole arrangement under which the rolling-stock was delivered to the railroad Co., but if the jury find that Coffroth, Uhl, and Sanner reserved the right to take possession of it at any time they saw

53 proper, there may be a recovery in this action."

12th. The court charged the jury in answer to def't's 8th point, which point is as follows:

That if the jury believe the defendant never took possession of the locomotive and gondolas and that the locomotive was not in his bailiwick at the time of sale of the road and its property, and that he merely sold the interest of the defendant Co. and did not deliver possession to the purchaser, the plaintiff cannot recover damages for them.

The answer to which was as follows:

"This point is refused."

13th. The court charged the jury in answer to def't's ninth point, which point is as follows:

That if the jury believe that the rolling-stock was purchased by Coffroth, Uhl, and Sanner on their individual responsibility, but surrendered the possession to the Co., and the Co. used the property on its road with the marks of the Co.'s ownership on them, and the money of the corporation was used to pay the rolling-stock or part of it, and that Sanner, Uhl, and Coffroth so reported under oath to the State authorities, and further reported the rolling-stock as belonging to the Co., then the transfer of Coffroth and Uhl to Hardesty passed no title.

The answer to which was as follows:

54 If the jury believe from the evidence that Coffroth, Uhl, and Sanner, as individuals, purchased the rolling-stock for themselves and gave their personal obligations for the price and delivered the rolling-stock to the railroad Co. to be used on the road, the other facts in this point are not inconsistent with Coffroth, Uhl, and Sanner's ownership of the rolling-stock.

14th. The court charged the jury in answer to def't's 10th point, which point is as follows:

If the jury believe the Co. issued a second mortgage, which was to be a lien on the rolling-stock acquired by the Co., and issued the bonds under the mortgage, and that $24,000 of these bonds were to be used to pay the indebtedness *of* Coffroth, Sanner, & Uhl had incurred in the purchase of the rolling-stock, and thereafter Coffroth, Sanner, & Uhl took these bonds and used them, then the bonds became a debt of the Co. and extinguished the claim of Coffroth, Uhl, and Sanner, and the plaintiff acquired no such title by the transfer of 20 Nov., 1878, as enabled him to maintain this suit, and the verdict must be for defendant.

The answer to which was as follows:

"This point is refused."

15th. The court erred in affirming the pl't'ff's first point,

55 which point reads as follows:

That if the jury find from all the evidence that Coffroth, Uhl, and Sanner purchased the rolling-stock in controversy individually, gave their personal obligations or promissory notes for the price, and that in pursuance thereof the property was delivered to them, then the title and actual possession of the said rolling-stock rested on them as individuals and not in the Somerset and Mineral Point Railroad Company.

The answer of the court to which point was:

"This point is affirmed."

16th. The court erred in affirming the pl't'ff's 2nd point, which point was as follows:

That if the jury further find that Coffroth, Uhl, and Sanner allowed or permitted the Somerset and Mineral Point Railroad Company to take the rolling-stock in controversy on their road for a certain compensation in the way of rent, and that they reserved the

right to take possession of it at any time they saw proper, that they did not thereby make the property liable to the debts of the old Co. secured by the 1st mortgage.

The answer to which was:

"This point is affirmed."

17th. The court erred in affirming the pl't'ff's 4th point,
56 which point is as follows:

That if the jury further find from the evidence that the locomotive and cars described in the sheriff's levy are the same property now in controversy, then and in that event the return of the sheriff endorsed on the writ is conclusive evidence that he took possession and control of the property so levied upon Dec. 16, 1878.

To which point the court answered:

"The return is conclusive evidence against the def't that he seized the engine and cars mentioned in the levy.

18th. The court erred in affirming the 5th point of plaintiff, which point is as follows:

That if the jury further find that Hardesty, the pl'ff, was the *bona fide* owner of the property on the 16th Dec., 1878, at the time of the levy mentioned in the 4th point, and then had the right to take immediate possession, the levy made by the def't was a trespass, and the plaintiff is entitled to sustain this action.

To which the court answered:

"This point is affirmed."

19th. The court erred in affirming the 6th point of the
57 pl't'ff, which point is as follows:

That if the jury find that the engine was taken away by direction of the 1st Nat'l B'k of Connellsville, the assignee of Bailey & Co.'s alleged right under the agreement of Nov. 8, 1877, between Coffroth, Uhl, and Sanner and Bailey & Co., after it was in custody of the sheriff by virtue of his levy, it was an unlawful act, and the said bank took nothing by virtue of said wrongful act under their alleged right by virtue of the aforesaid agreement of Nov. 8th, 1878.

The answer to which point was as follows:

"This point is affirmed."

20th. The court erred in affirming the pl't'ff's 7- point, which point is as follows:

That the depositing with Hardesty of a portion, to wit, $10,000, of the 2nd-mortgage bonds set apart for the use of the new company in the manner testified to by the plaintiffs and his witnesses, as collateral security for the individual debt of Coffroth, Uhl, and Sanner, was not such a sale of them as was contemplated by the resolutions of the board of directors in pursuance of which they were issued, and this act did not transfer the ownership of the
58 property in dispute from Coffroth, Uhl, and Sanner to the Somerset and Mineral Point R. R'd Co.

The answer to which point is as follows:

"This point is affirmed."

And the defendant's counsel excepts to the several matters of law in the charge and opinion of the said court as above set forth and

prays that a bill of exceptions thereto may be sealed and allowed by the court.

W. M. HALL,
Att'y for Def't, Geo. W. Pile.

And thereupon the foregoing prayer of the defendant's counsel is allowed and this bill of exceptions as prayed for is sealed.

M. W. ACHESON.

Indorsed: No. 2. May term, 1882. In U. S. cir. c't for west. dist. of Pa. R. S. Hardesty *vs.* Geo. W. Pile. Bill of exceptions to the charge and opinion of the court. Signed, sealed, and filed August 1, 1883.

59 In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

RICHARD HARDESTY
vs.
GEORGE W. PILE. } No. 2.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 29th day of August, A. D. 1883.

[Seal of the U. S. Circuit Court, W. D. Penn.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, district judge, presiding in the United States circuit court for said district, do hereby certify that H. D. Gamble, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
Dist. Judge, Presiding as U. S. Circuit Judge.

Pittsburgh, August 29th, 1883.

60 UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania,

To Richard S. Hardesty, a citizen of the State of Maryland, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C.,

on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein George W. Pile, a citizen of the State of Pennsylvania, [is] plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this seventeenth day of April, A. D. 1883.

M. W. ACHESON,
Judge of U. S. Circuit Court.

Served upon H. W. Weir, Esq., attorney for R. S. Hardesty, defendant in error, this 5th day of June, A. D. 1883, by exhibiting to him this writ, and making known to him the contents thereof, and delivering to him a true and correct copy thereof in the city of Pittsburgh, Pa.

JAS. G. BELL.

Sworn & subscribed before me this 5th day of June, 1883.

H. D. GAMBLE,
Cl'k U. S. C't C't.

[Endorsed:] No. 2. May T., 1882. Citation.

Endorsed on cover: No. 195. W. Penna. C. C. U. S. George W. Pile, plaintiff in error, *vs.* Richard S. Hardesty. Filed 29th October, 1883.

W 642

Supreme Court U. S.
FILED
JAN 12 1887
JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

No. 195 October Term, 1886.

GEORGE W. PILE, Plaintiff in Error,

vs.

RICHARD S. HARDESTY, Defendant in Error.

G. A. ENDLICH,
Attorney for Plaintiff in Error.

Supreme Court of the United States,

No. 193 October Term, 1886.

GEORGE W. PILE, Plaintiff in Error,

vs.

RICHARD S. HARDESTY, Defendant in Error.

I.—STATEMENT OF THE CASE.

The complex nature of the transactions and occurrences, of which this case is the outgrowth, requires a somewhat detailed statement in order to present intelligibly the questions involved.

The Somerset and Mineral Point Railroad Company was incorporated by an act of the General Assembly of the State of Pennsylvania approved March 17, 1868. The railroad to be constructed was one of about ten miles between the two points named, in Pennsylvania. The act gave the company power to borrow money, not exceeding $750,000, to issue bonds therefor, and to secure the same by mortgage upon the whole or any part of its railroads, equipments, real estate, corporate privileges and franchises. The railroad was constructed, and on June 3, 1871, in pursuance of authority given by the board of directors of the company, a mortgage was executed securing bonds to the amount of $50,000. The mortgage was on "all the present and future to be acquired property of the said Somerset and Mineral Point Railroad Company, that is to say, their road made or to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereof, and all rails and other materials used therein or procured therefor, and all bridges, viaducts, culverts, fences, &c., posts, grounds, and buildings thereon, and all engines, tenders, cars, tools, machinery, materials, contracts, and all its other real and personal property of

whatever kind, nature, or description, together with the tolls, rents, or income to be had or levied therefrom, and wherever situate, and whether the same be income resulting from leasing the said road for term of years or otherwise," and the franchises thereof. A second mortgage was subsequently placed upon the road, and under proceedings duly had upon it, the road was on December 1, 1874, sold to Messrs. Coffroth, Uhl, and Sanner for $22,050, expressly subject to the first mortgage above referred to.

The act of Assembly 8 April, 1861, P. L. 259, §1, provides that "whenever any railroad * * * of any corporation created under any law of this State, shall be sold and conveyed under and by virtue of any process or decree of any court of this State, or of the Circuit Court of the United States, the person or persons for or on whose account such railroad * * * may be purchased, shall be and they are hereby constituted a body politic and corporate, and shall be vested with all the right, title, interest, property, possession, claim, and demand in law and equity, of, in, and to such railroad * * * with its appurtenances, and with all the rights, powers, immunities, privileges, and franchises of the corporation as whose the same may have been so sold, and which may have been granted to or conferred thereupon by any act or acts of Assembly whatsoever, in force at the time of such sale and conveyance, and subject to all the restrictions imposed upon such corporation by any such act or acts." * * The act then proceeds to prescribe the mode of organization, certification, etc., of the purchasers, the adoption of a corporate name and seal, determination of the amount of capital stock, etc.

The act 17 February, 1867, P. L. 28, §1, extends the provisions of the act of 1861 to the cases of sales by trustees, &c., "under or by virtue of a power of sale, contained in any mortgage or deed of trust, without any process or decree of court in the premises," the same rights and privileges being extended to purchasers at such sales.

Under these acts Coffroth, Uhl, and Sanner, the purchasers of the S. & M. P. R. R., became and organized themselves as a corporation, adopting the name of the original company, to wit,

The Somerset & Mineral Point Railroad Company, and operated the road.

The first S. & M. P. R. R. Co. owned no rolling-stock. The cars, etc., used upon the road were leased to the company by the Pennsylvania Railroad.

After the organization of the second S. & M. P. R. R. Co., Coffroth, Uhl, and Sanner purchased an engine, a passenger car, a baggage car, two gondola cars, etc. They gave their individual notes for the same. The engine and cars were, however, marked, the former with the initials, the latter with the full name of the S. & M. P. R. R. Co. The rolling-stock was placed upon the road and used by the railroad company in the pursuit of its business. The date of the delivery of the engine to the company was March 12, 1875, that of the remainder of the rolling-stock March 31, 1875.

On March 6, 1875, the following resolution was passed by the Board of Directors of the S. & M. P. R. R. Co. at their March meeting, held at the company's office in Somerset:

"*Resolved*, That the President be and is hereby authorized and directed to issue $45,000 of coupon bonds of the company, payable on the first day of May, 1885, bearing interest from the first day of May, 1875, at the rate of seven per centum per annum, payable semi-annually on the first days of May and November of each year, on the delivery of the bonds and coupons thereto attached, at the office of the company at Somerset, Pennsylvania, and that the principal, at maturity, be made payable at the same place.

"*Resolved*, That the bonds be secured by a deed of trust or mortgage of and on the road, chattels, franchises, and property, acquired and to be acquired, of the said Somerset and Mineral Point Railroad Company, which said mortgage, though being a second mortgage on the road, franchises, etc., of said Somerset and Mineral Point Railroad Company, shall and is hereby declared to be a first mortgage on and upon all the rolling-stock, equipments, &c., purchased and put upon said railroad by the new company since the sale on the 21st day of December, A.D. 1874, to wit, engines, cars, gondolas."

The mortgage authorized by this resolution, and containing a stipulation reciting that, though a second mortgage on the

road, etc., it was a first mortgage on the rolling-stock, etc., "purchased and put upon the said road by the said company since the sale of the road," etc., "on the 1st day of December, 1874, to wit, the engines, coaches, cars, gondolas," etc., was on March 13, 1875, executed by Coffroth, as President, Uhl, as Secretary, and Sanner, as Treasurer of the company.

The acquisition of the rolling-stock and the giving of this mortgage and issuing of these bonds are intimately associated together, not only in point of time.

The testimony is unconflicting that the construction of the engine, etc., was ordered, and the contracts therefor were made, by Coffroth, Uhl, and Sanner, and that they gave their individual notes for the price agreed. Nor is there any dispute as to the marking and lettering on the engine and cars.

The testimony as to how and under what circumstances the rolling-stock came into the possession of the company is as follows, being all by witnesses of plaintiff below:

(*A. H. Coffroth on the stand:*)

Q. General Coffroth, was there any agreement at any time made between you as a corporation and yourself as an individual about this rolling-stock? and if so, where is the minute of that agreement which evidences the corporate act?

A. I don't know, Mr. Baer, as it ever was carried on the minutes. But it is so unfortunate the paper is lost which shows it, because it would sustain me all through—the written agreement at the time. I regret exceedingly that it was lost.

Q. You say there was a written agreement?

A. There was.

Q. But did you not tell us that the railroad company was no party to it?

A. It was signed by Coffroth, Uhl, and Sanner.

Q. But the company, as a corporation, was no party?

A. No.

Q. I am asking you for some agreement or arrangement made between you and the company. Do you know of such?

A. There was none, except what was verbally said at first: that we owned the rolling-stock as individuals, and that we permitted it to be used on the road, and all we asked was to pay the interest on the money in that and the repairs, and when we could sell $24,000 of bonds, then it was to be refunded, and we

were to be repaid and the rolling-stock transferred to the company. Now, that was all the agreement.

Q. Among yourselves?

A. That was stated to the Board of Directors and to other persons. The officers and employees of the road were instructed to take good care of it, that the property belonged to us as individuals when it was first put on. * * *

(*John H. Uhl on the stand:*)

A. * * Mr. Coffroth and myself also made an agreement [the writing above mentioned] as to how we would hold this property. * *

* * * * * * *

A. By that paper, Mr. Coffroth, Sanner, and myself were to hold this property as individual property, * * and put it upon the road * * for which the company was to pay a reasonable rent for the use of that rolling-stock upon said road, to wit, to keep the property in good repair, and pay the interest on the money for the money invested in this property. That was about the substance of it. * *

* * * * * * *

A. It was reserved therein, at the time, that we could take and use this property as our own, take it off the road and sell it as we thought best.

It thus appears that there was, with reference to this property, an agreement between Coffroth, Uhl, and Sanner, regulating their interests, *inter se*, in the property, and the disposition to be made of it by them, and as between them and the corporation, a loose verbal understanding that the latter was to have the use of it, unlimited as to time and unqualified by reservations, in consideration of the payment of rent equal to the interest on the purchase-money and repairs; that it was to make some provision for reimbursing Coffroth, Uhl, and Sanner, and that thereupon the title to the rolling-stock was to be in the railroad company. It is in the light of this understanding that the issuing of the bonds and execution of the mortgage authorized by the resolution of March 6, 1875, and the disposition made of these bonds, become important.

(*A. H. Coffroth on the stand:*)

Q. After the execution of this morgage, did you issue the bonds to the amount of $45,000?

A. Yes, sir; bonds to the amount of $45,000 was issued.

* * * * * * *

A. * * * Mr. Sanner, Mr. Uhl, and myself, instead of taking all stock for the purchase-money what we had paid for the road ($22,050), we took $7000 of bonds, $24,000 were executed and put into the hands of the Treasurer for the purpose of selling, if we could sell, to sell them. Then we were to transfer this rolling-stock and pay it out of the $24,000. * * *

(*J. H. Uhl on the stand:*)

Q. What became of those bonds?

A. They were issued, as I told you a moment ago—$7000 of them delivered to myself, $7000 to Coffroth, and $7000 to Mr. Sanner. That represented the money that we paid for the road when it was sold. Then there were $24,000 of bonds issued and put in the hands of the Treasurer, that when sold, if they could be sold at all, the money realized from them was to go towards the payment of the rolling-stock. As soon as the rolling-stock was paid we would transfer it for the money.

* * * * * * *

Q. Were not those bonds delivered to Mr. Sanner and didn't he receipt for them, stating that the bonds when sold, the amount is to be applied to the indebtedness of Coffroth, Sanner, and Uhl for rolling-stock?

A. * * * I think that is correct. I think that is about the sum and substance of what I have testified to before. We got that amonnt for that purpose, and whenever anything was realized on them, it was to go towards the payment of that investment of this rolling-stock. When that was done, it was to be transferred to the company.

(*M. A. Sanner on the stand:*)

Q. What office did you hold?

A. I was Director.

Q. Any other office?

A. And Treasurer.

* * * * * * *

Q. Were you present at a meeting of the Board of Directors on the 1st day of May, 1875, when it was resolved that $24,000 of the bonds of the company be placed in the hands of M. A. Sanner, numbered from 1 to 240 inclusive, the proceeds to be applied to rolling-stock, etc.?

A. I was.

* * * * * * *

Q. Mr. Sanner, didn't you receive from the S. & M. P. R. R. Co. bonds of said company numbered from 1 to 240 inclusive, which, when sold, the amount is to be applied to the indebtedness of Coffroth, Sanner, and Uhl?

A. I did.

Q. Of the rolling-stock or any indebtness?

A. The rolling-stock on the road.

(*Peter Heffley on the stand:*)

Q. Mr. Heffley, were you present at the meeting when the mortgage bonds were ordered to be issued?

A. I think I was.

Q. Were you present at a subsequent meeting when a resolution was passed appropriating $24,000 of the bonds toward the payment of rolling-stock?

A. My recollection is that I was there at the time that matter —that the president (Coffroth) had the matter before the Board.

* * * * * * *

Q. The understanding was that this $24,000 was to be issued to the President, Treasurer, and Secretary, to be sold to pay them for the rolling-stock; is that so?

A. There was a certain amount, I don't remember whether it was $21,000 or $24,000; I don't remember, but then it was the amount of the investment.

Q. In the rolling-stock?

A. Yes, sir.

Q. Was there not * * * $24,000 for the purpose of reimbursing them for the rolling-stock?

A. The $24,000 was to be used for that purpose. The bonds were be issued and sold. If the bonds could be sold, it was to be applied to the payment of this rolling-stock.

Q. And then the rolling-stock was to go to the company?

A. Yes, sir; then the rolling-stock was to go to the company.

Q. The company did issue the bonds?

A. I presume they did.

Thus the stock got into possession of the railroad company under the agreement above stated, and the company, in pursuance of it and for the purpose of perfecting its qualified title to the same, issued bonds to the amount of $24,000, which were placed in the hands of Sanner, one of the original purchasers of the rolling-stock, and also Treasurer of the company. It was understood and agreed that these bonds were to be realized on,

and when realized on, were to pay Coffroth, Uhl, and Sanner for the stock and complete the company's title.

In the winter of 1875, Coffroth, Uhl, and Sanner made a loan of Mr. Hardesty, the defendant in error, and gave their bond for the amount; but they also took the $24,000 of bonds deposited with the Treasurer and handed them over to Mr. Hardesty as security.

(*A. H. Coffroth on the stand:*)

Q. Subsequently, on the 1st of December, 1875, a portion of these bonds were placed as collateral for the Hardesty bond?

A. Yes, sir; I believe so.

(*M. A. Sanner on the stand:*)

Q. What security did you give for that bond that you gave Hardesty?

A. I don't remember the amount.

Q. Didn't you deposit some of those bonds, those $45,000 bonds secured by this mortgage of the 13th of March, 1875?

A. What for—security?

Q. Yes, sir.

A. No; that is what I am going to tell. I can't tell the amount or number of bonds; but there was not sufficient of them there, and I gave $2000 of bonds of the first mortgage bonds of the old company.

* * * * * * *

Q. You did give the other bonds too?

A. Yes, sir.

* * * * * * *

Q. Will you look at that (paper handed the witness, being the receipt given by Sanner, Treasurer, for the deposit of the $24,000 bonds), and state whether some of those bonds of the S. & M. P. R. R. Co. were not among those which you pledged with Mr. Hardesty?

A. I think so.

Q. Those were the bonds which you deposited with Hardesty?

A. I think so. (Subsequently qualified by "some of them.")

The bond given by Coffroth, Uhl, and Sanner to Hardesty contains the following:

"Twenty-eight thousand dollars of the bonds of the Somerset and Mineral Point Railroad Company are herewith deposited with this bond as collateral security for the same."

A letter from Hardesty to Kimmel & Son, Somerset, dated December 26, 1878, relative to the S. & M. P. R. R. contains the following: "I hold second mortgage bonds, $26,000, as collateral for the three parties' bond."

This evidence, then, establishes (1) that the original indebtedness of Coffroth, Uhl, and Sanner for the rolling-stock was discharged with money raised, in part at least, upon the security of obligations given by the company, and becoming and remaining an outstanding indebtedness of the same; (2) that by the act of Coffroth, Uhl, and Sanner the $24,000 bonds of the company deposited with the Treasurer, Sanner, for the purpose set forth in the resolution of May 1, 1875, or a part of the same, were withdrawn and applied for the benefit of Coffroth, Uhl, and Sanner in payment of their personal obligations for the rolling-stock. This was in December, 1875.

During the next following years the rolling-stock was used by the company. Various expenses for repairs, etc., were defrayed out of the company's funds. The reports of the officers of the company to the stockholders, and the sworn reports of the President and Treasurer to the Auditor-General of the State of Pennsylvania, referred to and mentioned the rolling-stock as part of the property of the railroad company, paid for out of its earnings.

Thus in the annual report of A. K. Coffroth, President, to the stockholders of the S. & M. P. R. R. Co. for the year ending December 31, 1875, it is said:

"The rolling-stock on the road at the beginning of the year, and which had been leased from the Pennsylvania Railroad Company, has been returned to its owner, and entirely new rolling-stock *has been purchased and put upon the road by your company*. The engines, cars, and gondolas are of the best quality, and were bought with a view to have the road well equipped.

"During the year the road-bed has been greatly improved, new iron has been put down where needed, and the road has been thoroughly ballasted. The road is now pronounced to be in good running order, and can be kept in this condition without much further expense. It can now be truthfully said that you have a railway that will compare favorably not only with the best equipped branches in the State, but with the main lines." * * *

"On the 6th day of March last, the Board of Directors adopted resolutions authorizing and directing the President to issue $45,000 of coupon bonds of the company, payable on the 1st day of May, A.D. 1875, at the rate of 7 per cent. per annum, payable semi-annually on the 1st days of May and November of each year, the bonds to be secured by a mortgage of and on the road, chattels, franchises, and property acquired and to be acquired by the company. The mortgage was duly executed and recorded, and bonds to the amount of $45,000 issued; and although a second mortgage on the road-bed, buildings, franchises, etc., *it is a first mortgage upon all the rolling-stock and equipments purchased and put on the road by the company.* These bonds are held by the President, Treasurer, and Secretary of the company. All the interest due on the bonds was paid at the time when due and payable.

"*The road is entirely free from floating debt, its only indebtedness being its funded debt.*" * * *

The report made to the Auditor-General for the same year is as follows:

STATE OF PENNSYLVANIA, } ss.:
Somerset County, }

Personally appeared A. H. Coffroth, President, and M. A. Sanner, Treasurer, of the Somerset and Mineral Point Railroad Company, and in due form of law made oath, that the statements in the within report, for the financial year ending December 31, 1875, are true to the best of their knowledge and belief.

(Signed) A. H. COFFROTH, *President.*
M. A. SANNER, *Treasurer.*

Sworn and subscribed before me this 16th day of February, 1876.

A. J. COLBORN, *Notary Public.*

STOCK AND DEBT.

* * * * * * *

Funded debt as per last report.....$50,000 00

The amount now of funded debt (classified and date of maturity) as follows:

1st mortgage bonds (date of maturity July 1, 1901)..... $50,000 00
2d mortgage bonds (date of maturity May 1, 1885)..... 45,000 00
3d mortgage bonds: None. ——— $95,000 00

Floating debt as per last report, and the amount now of floating debt None.

Rate per cent. per annum of interest on funded debt: 1st and 2d mortgage bonds..... 7 per cent.

* * * * * * *

Cost of Road and Equipment.

	By last report.	By present report.
Construction	Not reported.	$172,140 00
Equipment	" "	16,900 00
Total cost		$189,040 00

Characteristics of Road.

* * * * * * *

Number of engine houses and shops	1
Number of engines	1
Number of first-class passenger cars (average cost of each, $3200)	1
Number of second-class passenger cars (average cost of each, $800)	1
Number of baggage, mail, and express cars (average cost of each, $800)	1
Number of freight cars: house cars, none; trucks (average cost of each, $450)	2
Number of coal, ore, and stone cars (average cost of each, $450)	2

* * * * * * *

Expenses.

Maintaining the road or real estate of the corporation:	
Repairs or maintenance of way, including buildings	$1618 75
Repairs of machinery:	
Repairs of engines and tenders	$50 00
Repairs of passenger and baggage cars	120 00
Repairs of freight cars, repairs of tools and machinery in shops, incidental expenses, including oil, fuel, clerks, watchmen, &c.	None.
Total	$170 00
Operating the road:	
Office expenses, stationery, &c.	$143 78
Agents and clerks	None.
Labor—loading and unloading freight, porters, watchmen, and switch-tenders	330 00
Conductors, baggage-masters, and brakemen	825 00
Engineers and firemen	1110 25
Fuel and cost of preparing for use	473 85
Oil and waste for engines and tenders, passenger, baggage, and freight cars	80 00
Total	$2962 88
Receipts on construction and equipment account during the year:	
From stockholders and sale of bonds	Nothing.
From other sources: From earnings of road and applied to equipping the road with rolling-stock	$4400 81

RECEIPTS.

[January, 1875, to December, 1875, inclusive.]

Passengers.	Freight.	Mail and Express.	Total.
$6666 35	$4779 61	$1225 98	$12,671 94

SUMMARY OF PAYMENTS.

For construction and equipment	$4400 81
For maintaining the road, &c.—repairs of machinery and operating the road	4751 63
For interest	3519 50
Total	$12,671 94

Similar reports were made from year to year, consisting largely of re-statements concerning funded and floating debts, property, interest payments, rolling-stock, etc. The summary of earnings and expenses, taken from these reports, is as follows:

	Gross Earnings.	Expenses.	Net Earnings.
1875	$12,691 94	$4,751 63	$7,920 31
1876	11,169 76	4,362 56	6,807 20
1877	9,327 25	5,046 10	4,281 15
Total			$18,008 66

The item, contained in reports after that for 1875, under *Summary of Payments*, "For miscellaneous and surplus fund," is answered: "*All paid to equip the road on rolling-stock bought last year*" (or, "*in 1875*").

The state of affairs shown by these reports was, however, on the trial below, denied by the persons who made and swore to them. It was asserted that there never were any net earnings, any surplus fund, any moneys in the company's hands to pay for the equipment: that the road never paid anything beyond expenses, including repairs to the rolling-stock, and interest on the sums borrowed by Coffroth, Sanner, and Uhl to pay for the same. The exact amount of these expenditures, or of the receipts of the road, does not appear from the testimony. The treasurer testified that he kept, as such, no accounts. As to the nature and extent of the repairs, the following appears from the testimony of witnesses of plaintiff below:

(*Emanuel Hass, machinist, on the stand*, after stating that he knew this engine and rolling-stock:)

Q. What was it worth at the time it was built, in your judgment?

A. Well, the engine was worth at least a thousand dollars more in 1878 than when it was first built, from the repairs and improvements that were put on it.

(*Jacob Neff, carpenter and fireman of the engine, on the stand:*)

Q. Will you state what condition as to repair the passenger car and the baggage car and the gondolas were in (in November, 1878)?

A. The passenger car was in a good condition, a better condition when it was sold (1878) than before it came there, when new.

Q. How was the baggage car?

A. The baggage car was poorly constructed when they bought it; but after it was wrecked and rebuilt, then it was in better condition than it was when it first came there.

The bond given by Coffroth, Uhl, and Sanner to Hardesty fell due on December 21, 1877. What occurred then appears from the testimony of Coffroth.

(*A. H. Coffroth on the stand:*)

Q. General, you spoke of a visit you made in 1877 to Baltimore in company with Mr. Uhl to arrange with Mr. Hardesty for the extension of the time of payment of the bond; can you fix the date of that visit?

A. About the 10th day of December.

Q. 1877?

A. Yes, sir; a short time before the bond was due, ten or twelve days.

Q. At that time, you say, you told him you were ready and willing to transfer the rolling-stock to him as additional security, and that he could take possession of it at any time, either take it off the road or lease it to the company?

A. I did, sir, any time he became alarmed.

What Mr. Hardesty's answer to these propositions was, does not appear in the notes of testimony. Certain it is, however, that no transfer of the stock was at that time attempted by Coffroth, Uhl, and Sanner, nor were they then pushed upon their bond. A year elapsed before any further transactions occurred

between those gentlemen. On August 23, 1878, suit was brought on coupons of the first mortgage, subject to which Coffroth, Uhl, and Sanner had bought the road and organized the new company. Judgment was obtained in that suit against the S. & M. P. R. R. Co., for default of an affidavit of defense, on September 30, 1878. On October 1, following, an affidavit of defense and petition by J. H. Uhl, Secretary of the S. & M. P. R. R. Co., was filed, asking to have the judgment opened. On November 21, 1878, this application was rejected by the Court. On November 25 execution was issued on the judgment of September 30.

Of the levy made under this execution, the following return was made by the Sheriff:

"By virtue of the within writ I went to the respective offices * * and demanded payment * * Payment thereof has not been made. And I have, therefore, by virtue of the same written writ, levied upon the right, title, interest, and claim of the S. & M. P. R. R. Co. of, in, and to the Somerset and Mineral Point Railroad in Somerset Co., Pa., and upon all property, real, personal, and mixed, including locomotives, cars, hand-cars, tools, engine houses, depot, water-station, siding and switches now in the regular use of said railroad company in the conducting of its business as a carrier, and the rights, franchises, privileges, and rights of way of said company, incident, appurtenant, or in anywise appertaining or connected therewith, December 16, 1878."

The testimony concerning the character of the levy is as follows:

(*George W. Pile, the Sheriff and defendant below, on the stand:*)

Q. I wish you would state whether at the time of the levy you took the property into possession at all.

A. I did not.

* * * * * * *

Q. On the 16th day of December you made a levy—paper levy—simply putting down that you levied upon the interest of the defendant and all the rolling-stock?

A. Yes, sir.

Q. You didn't interfere with the running of the road in any way?

A. No, sir.

* * * * * * *

(*Cross-examined:*)

Q. Now, do you pretend to say that you don't know whether you levied upon this rolling-stock or not?

A. There was a levy made upon the road and all the right, title, interest, and claim of the S. & M. P. R. R. Co.

His testimony before had been, *inter alia*, as follows:

Q. You knew that they (engine, cars, &c.) were claimed by Mr. Hardesty?

A. Not at the time.

Q. You took a bond, didn't you, to indemnify you?

A. I did.

Q. Who gave you the bond?

A. [Wm. M. Hall, Christian Long, and George F. Baer.]

On November 22, 1878, at the instance of holders of first mortgage bonds of the S. & M. P. R. R. Co., upon a bill in the nature of *quia timet*, an injunction had been granted against certain agents of the Connellsville National Bank, which claimed a right to the engine, restraining them from removing the same. Some time between December 25, 1878, and January 1, 1879, in defiance of this injunction, the engine was removed by these persons. Proceedings in attachment were promptly begun against them, and to guard against similar accidents to the rest of the rolling-stock, the Sheriff, in whose hands the process was, locked the wheels of the cars.

(*George W. Pile, Sheriff, on the stand:*)

Q. That injunction was in your hands and served by you?

A. Yes, sir.

Q. Now, then, subsequent to the service of that injunction, Mr. Pile, the locomotive was taken away?

A. Yes, sir.

Q. I wish to know from you whether you didn't lock these two cars to prevent them (from) being taken away the same way that the locomotive was taken away, in obedience to the injunction. (Objected to.

A. I did.

Q. It was, then, under this injunction that you locked the cars?

A. Yes, sir.

Q. Did you lock these two cars that you speak of after the locomotive was taken away?

A. Yes, sir.

Q. What was your purpose in locking them? (Objected to.)

Q. I wish you would state if it was to prevent them from being taken away.

A. Certainly.

Q. State whether you ever interfered with the running of the cars or this engine upon the road until after the locomotive was taken away.

A. I never did.

* * * * * * *

Q. What you did with reference to the cars in the way of locking was done before the engine was taken away or after?

A. Afterwards.

Q. For what purpose did you lock the cars?

A. To prevent them from being taken away.

* * * * * * *

Q. These gondolas that have been spoken of—did you ever touch them?

A. To the best of my knowledge I never did.

The sale under the levy of December 16, 1878, was fixed for January 2, 1879, about 1 o'clock P.M. On that day, probably at the time of the sale, the following notice was served upon the Sheriff:

"*To George W. Pile, Sheriff of Somerset County:*

"You are hereby notified not to sell the following rolling-stock on the Somerset and Mineral Point Railroad, to wit, one passenger car, one passenger and baggage car combined, two gondolas, and one engine marked "A," as I am the owner of the said passenger car, passenger and baggage car, the two gondolas (and the engine, subject to the payment of $1500 due W. K. Baily & Co. or their assigns).

"January 2, 1879. RICHARD S. HARDESTY,

"By his attorneys, W. H. Ruppel and Val. Hay."

The sale took place at the court-house in Somerset, some distance from the railroad and out of sight of the rolling-stock. The engine, admittedly, was out of the county. The following return was made of it by the Sheriff:

"January 2, 1879, all the right, title, interest, and claim of the Somerset and Mineral Point Railroad Company, of, in, and to the Somerset and Mineral Point Railroad, in Somerset County, and State of Pennsylvania, and all property, real, personal, and mixed, including locomotive, cars, hand-cars, tools, engine-houses, depot, water-station, siding, and switches as held by the said Somerset and Mineral Point Railroad Company, in the conducting of its business as a carrier, and all the rights, franchises, privileges, and right of way of said company, incident and appurtenant or in anywise appertaining or connected therewith, sold to Christian Long for the sum of twenty dollars, of which $18.25 was applied to costs. Sheriff for all costs but attorney fee."

The evidence concerning the sale and its incidents is as follows:

(*Valentine Hay, Esq., on the stand:*)

Q. Will you state, sir, whether you gave this defendant, Mr. Pile, any notice as to the ownership of this property?

A. I did.

Q. Was it in writing?

A. It was.

Q. How did you serve it upon him?

A. By a copy, and reading it before the sale.

Q. State whether he had taken possession of the property.

A. Whether he had?

Q. Yes, sir.

A. I understand so; yes, sir.

Q. Were you present at the sale?

A. I was present at the sale.

Q. Did he sell it?

A. He did.

(*Cross-examined:*)

Q. Where was the sale held?

A. It was held at the court-house.

Q. He didn't have the locomotive and the cars there?

A. No, they were not there.

* * * * * * *

Q. Mr. Hay, the railroad property—the whole equipment and all—was put up by the Sheriff as an entirety?

A. I think that is the way it was done.

Q. And sold in that way?

A. I think it was sold just as it was advertised.

* * * * * * *

Q. You do remember it was sold as an entirety?
A. Yes, sir, I do.
Q. That it was the right, title, interest, claim, and demand?
A. That is my general recollection.
Q. Now, you say, you understood—do you know that the Sheriff had possession of the property, of your own knowledge?
A. Not from my own knowledge, only from hearsay, except I saw from the handbills.
Q. Mr. Hay, try and remember, wasn't the sale in the court-room?
A. Do you mean the court-room above—upstairs?
Q. Upstairs.
A. I couldn't tell.

(*George W. Pile, Sheriff, on the stand:*)
Q. Where was that sale held?
A. It was held in Somerset, in the court-room.
Q. In the court-room?
A. Yes, sir.
Q. At the time you held this sale, you don't know whether the engine was brought back or not; where were the cars?
A. The cars were standing on the track close to Mineral Point.
Q. How close is Mineral Point to Somerset?
A. About nine miles.

* * * * * * *

Q. When did you unlock the cars?
A. I couldn't state the exact time, but immediately after the sale; it might have been the same day, likely next day, and may not until Monday, as the sale was on Saturday; I couldn't tell the exact time.

After the sale, various exceptions were filed to it in behalf of the S. & M. P. R. R. Co., defendant, and the Court was asked to set it aside.

In the meanwhile, proceedings had been taken under the first mortgage to sell the road. The trustee named in it, Mr. M. A. Sanner, had been discharged and taken an appeal from the order discharging him. Mr. Isaac Kauffman had been named as Trustee in his place, and, under the power of sale contained in the mortgage, he, on January 2, 1879, at 2 P.M., sold the S. & M. P. R. R. to Christian Long for $6000.

The condition of affairs, then, immediately before January 8, 1879, was this:

1. The right, title, and interest of the S. & M. P. R. R. Co. to the road and rolling-stock had been sold by the Sheriff. The validity of this sale was in litigation.

2. The road and the property upon it had been sold by the Trustee under the first mortgage. This sale remained unconfirmed.

3. The authority of the Trustee and the validity of his appointment were questioned, and an appeal involving the same was pending.

4. The title to the entire rolling-stock was claimed by Hardesty on one side and by the purchaser at the two sales on the other.

5. The principal item in said stock, the engine, was beyond the reach of either party, run off by the Connellsville Bank, in defiance of an injunction under a claim of title adverse to both of the other parties.

6. An attachment for contempt against this party was pending in the court of Somerset County.

In these circumstances, the attorneys representing the various parties, on January 8, 1879, came together and entered into the following agreement:

Whereas, Upon proceedings had in the Court of Common Pleas of Somerset County, sitting in equity, on petition of Geo. F. Baer and C. Long, Isaac Kauffman was appointed Trustee for the holders of the first mortgage bonds of the Somerset and Mineral Point Railroad Company, in the place and stead of M. A. Sanner, who was relieved from his trust.

And whereas, Isaac Kauffman, as Trustee, on 2d January, 1879, sold at public sale, after due and timely notice, the said S. & M. P. R. R., with its property and franchises, to C. Long, and made a deed for the same.

And whereas, G. W. Pile, Sheriff, at same time and place, sold the railroad franchises and property, real, personal, and mixed, of said company, on a *fieri facias* in favor of G. F. Baer, to C. Long.

And whereas, M. A. Sanner entered an appeal to the Supreme Court, in the matter of the removal from trust and appointment of said Kauffman. And the said railroad company

by its attorneys filed a motion to set aside the sale made by the Sheriff. *And whereas*, R. S. Hardesty by his counsel gave notice on the day of sale that he was the owner of the rolling-stock heretofore and then on the said railroad and in the custody of the said company, subject to the payment of $1500, to the First National Bank of Connellsville, as balance payable on locomotive. *And whereas*, The said First National Bank caused a notice to be served upon the Sheriff and Trustee prior to the sale, setting forth substantially that it was the owner of said locomotive.

And whereas, Subsequently the said locomotive and tender were taken possession of and removed from the said railroad, and from the possession of said company, by Messrs. Newmyer and Caleb, acting for said First National Bank, under an alleged claim of right to take and remove.

And whereas, The officers and employees of said railroad company had been duly enjoined from selling, removing, or in anywise disposing of the said rolling-stock, and after the removal of the same by Messrs. Newmyer and McCaleb, were ruled to appear and show cause why an attachment should not issue, &c.

And whereas, It is desirable that the relative rights of all parties interested or concerned should be determined at law.

It is therefore hereby agreed:

1st. That the appeal taken in the proceedings relieving M. A. Sanner of his trust as Trustee, and appointing Isaac Kauffman in his stead, be withdrawn at the costs of the appellant.

2d. That the sale made by Isaac Kauffman, as Trustee, on the 2d January, 1879, may be confirmed.

3d. That the motion to set aside the Sheriff's sale of the S. & M. P. R. R., made on 2d January, 1879, be by the Court discharged at the cost of petitioner, and that the sale be confirmed.

4th. That the locomotive and tender be at once returned and placed upon said railroad, and into the custody and possession of the purchaser at Sheriff's and Trustee's sale.

5th. That the rights of the said First National Bank to the said locomotive and tender be determined in an action at law. The said C. Long to give bond in $6000, within fifteen days, conditioned for the payment to it of such sum as may legally be recovered for or on account of said locomotive, or the surrender of the locomotive and tender, in as good condition as now. But, if Long elects to pay the amount due and payable to said bank, as and when payable, and makes this election within 30 days, then the entire rights of the First National Bank shall be assigned and transferred to him, and the status to be the same as if it had not been removed

6th. The rights of R. S. Hardesty to any title or claim to the rolling-stock, if he has any legal right, shall be determined according to law. This agreement is not to prejudice any right he may have and which can be legally established to the rolling-stock.

7th. If Long declines to furnish a bond within fifteen days as above in section 5 provided for them, the locomotive and tender shall be returned to the parties who took it, Messrs. Caleb and Newmyer, and the proceedings now pending for contempt of Court in removing the same shall occupy and be in the precise status as the case now stands, and that such surrender shall give said national bank no other or greater rights than it now has.

8th. That the proceedings for contempt against Somerset County parties may be dismissed upon the withdrawal of the appeal above referred to and discharge of rule for setting aside Sheriff's sale as hereinbefore provided for. All the provisions of this agreement to be embodied in a decree of this Court.

BAER & BAER,
Attorneys for C. Long et al.
W. H. KOONTZ,
Attorney for Trustee.
W. H. RUPPLE,
VALENTINE HAY,
Attorneys for R. S. Hardesty, M. A. Sanner, Defendant, Company, et al.
A. H. COFFROTH,
J. H. UHL,
C. E. BOYLE,
Attorney for First National Bank, Connellsville.

January 8, 1879.

There is no evidence in this case bearing upon the question of the right of any of the attorneys signing the agreement to represent and sign for the parties they assume to act for, except Messrs Ruppel and Hay.

(*Val. Hay, Esq., on the stand:*)
Q. What is your profession and occupation?
A. Practicing law.
Q. How long have you practiced your profession?
A. Twenty-five years, nearly.

* * * * * * *

(*Cross-examined:*)

Q. You say you were employed by Mr. Hardesty?

A. Yes, sir.

Q. Who employed you for him?

A. Mr. Ruppel and I were employed together.

Q. Who spoke to you for Mr. Hardesty?

A. We had a letter from Mr. Hardesty.

Q. Do you remember when you were employed by Mr. Hardesty?

A. No; I can't. It was not very long before the sale.

* * * * * * *

Q. Were not you employed by Mr. Hardesty through a letter he wrote to John O. Kimmel?

A. To John O. Kimmel?

Q. Yes, sir.

A. No; the letter was directed to Ruppel and myself. (Subsequently added: "We had a letter, a separate letter, a distinct letter addressed to us.")

This letter is not in evidence. It appears, however, that Hardesty first wrote to J. O. Kimmel & Sons, inclosing a certain document which will hereafter appear. But Mr. Kimmel refused to do anything about it. The following letter was in evidence:

"BALTIMORE, December 31, 1878.

"*Mr. J. O. Kimmel:*

"DEAR SIR,—You will please hand the assignment of rolling-stock on Somerset Railroad to Mr. Valentine Hay.

"He will act for me and try to secure part of the money that the parties owe me.

"Yours respectfully,

"RICHARD S. HARDESTY."

It is admitted, on all sides, that Messrs. Hay and Ruppel received the paper from Mr. Kimmel. And it also appeared that these gentlemen represented Mr. Hardesty in a suit, No. 51 January Term, 1881, against Coffroth, Uhl, and Sanner.

The above agreement was, on the same day, filed of record in the injunction suit, and a decree entered therein in conformity with it as follows:

And now, January 8, 1879, after hearing the parties and their counsel on the rule to show cause why an attachment should not issue against them for a contempt of Court, and after due consideration thereof, and in pursuance of the agreement this day signed by them and other parties in interest and filed in this case, it is ordered and decreed by the Court:

1. That the locomotive and tender taken by the said P. S. Neumyer and J. S. Caleb be by them immediately returned to the place from which it was taken, to wit, on railroad siding at Mineral Point, in the same condition it was when taken, and possession thereof given to C. Long, the purchaser under the sales made by the Trustee and Sheriff.

2. That the said C. Long, within fifteen days from this date, execute and deliver to the First National Bank of Connellsville, his bond in the sum of six thousand dollars ($6000), conditioned for the payment to said bank of such sum of money as may be legally recovered for or account of said locomotive, in an action of law to be brought by said bank, or in default thereof to return said locomotive and tender in as good condition as when received by him.

3. But if said Long shall within thirty days from this date pay to said bank the sum of fifteen hundred and two dollars and eighty cents ($1502.80), with interest thereon from this date, then the said bank shall relinquish and transfer to said Long all their interest and claim in and to said locomotive and tender.

4. If said Long fail or neglect to give his bond as provided in the second section of this decree within the time therein specified, the said locomotive and tender shall be by him immediately returned to Connellsville, and delivered over to the First National Bank of Connellsville, in the same condition as when received, and the status of the parties in reference thereto shall be the same as if this decree had never been made. *Provided*, however, that if he pay the sum of money provided for in the third section of this decree before the fifteen days shall have expired that shall supersede the necessity of giving said bond, and if paid after that, and before the expiration of thirty days, the said bond shall be returned to him.

Per Curiam,

H. F. SCHELL, *Prs.*

On the same day the Trustee's and Sheriff's sales were confirmed, the engine was returned, and the road and its equipments passed into the hands of the purchaser, Long, with whom were

associated Messrs. W. J. Hall and Geo. F. Baer, who, under the above-mentioned acts of 1861 and 1867, organized a new company, the Somerset and Cambria Railroad Company.

The Connellsville Bank, in order to enforce its title to the engine under the agreement, brought a suit against this company in the United States Circuit Court, Western District, Pennsylvania, to No. 29 November Term, 1879, in which it failed to recover.

Mr. Hardesty, on November 18, 1880, brought suit in the Common Pleas of Somerset County, to No. 51 January Term, 1881, against Coffroth, Sanner, and Uhl upon their bond of December 21, 1875. The amount claimed as balance due on the bond and interest was $15,265.

The defendants filed an affidavit of defense reducing the amount of the bond ($15,000) by deductions (for $1390, usurious interest, added for the two years before the bond was payable, and by the price of a house in Baltimore, which they were induced to take at $2000, as part of its loan, upon plaintiff's guaranty of its value, and which turned out worthless beyond the lien resting upon it) to $11,610, and upon this claimed credit for payments in excess of legal interest, and tendered judgment for $8956.83, with interest from September 21, 1878. This tender, repeated, on July 21, 1881, the total then amounting to $10,479.49, was accepted by plaintiff.

Mr. Hardesty, then, on November 18, 1881, brought suit in the United States Circuit Court, Western District, Pennsylvania, to No. 2 May Term, 1882, against George W. Pile, the plaintiff in error, in trespass *vi et armis de bonis asportatis*, the trespass alleged being the levy by Pile, while Sheriff of Somerset County, on December 16, 1878, upon the rolling-stock, of which Mr. Hardesty claimed to have at that time the right of property and of immediate possession.

This right he claims under and by virtue of the following instrument:

"For value received, we hereby sell, transfer, and set over to R. S. Hardesty, of the city of Baltimore, one engine (letter A), subject to the lien of $1500; one passenger car, one car used for baggage and passengers, and two gondolas, being the rolling-stock now in use on the Somerset and Mineral Point Railroad.

"The said rolling-stock to be appraised by competent persons, and the value thereof to be credited on the bonds of A. H. Coffroth, M. A. Sanner, and John H. Uhl.

"Witness our hands and seals this 20th day of November, 1878."

"A. H. COFFROTH," [L.S.]
"J. H. UHL." [L.S.]

(Sanner's interest, if he had any, had, in the meantime, passed to Coffroth and Uhl.)

The facts surrounding the giving of this paper are best shown by the testimony concerning it, to be considered in connection with evidence already stated regarding the loan from Hardesty (in 1875), and the visit of Coffroth and Uhl to Baltimore (in 1877) to obtain an extension of time for payment of their bond. (See *ante*, p. 13, &c.)

(*John H. Uhl on the stand:*)

Q. Will you state whether or not, in pursuance of that arrangement (with Hardesty, of December, 1877, see *ante*, p. 13), you did execute a bill of sale, and delivered it to Mr. Hardesty?

A. Yes, sir, in pursuance of the agreement we made down there (at Baltimore) at that time, we did, on the 20th day of November, 1878, make a bill of sale, I signed it, and General Coffroth. We signed it in each other's presence, and if I mistake not, it was put up in an envelope in a letter and I carried it to the post-office the same day.

Q. Mailed it to Mr Hardesty at Baltimore?

A. It was directed to Mr. Hardesty at his place of business in Baltimore.

(*Cross-examined:*)

Q. Did you receive from Mr. Hardesty any acknowledgment of the receipt of this assignment?

A. No, sir.

(*A. H. Coffroth on the stand:*)

It ran in that way till 20 November, 1878. About the 20th November, the very day that the assignment was written, Mr. Colborn, attorney for Mr. Hardesty, called on me to pay the bond or give further security, and threatened to bring suit. I didn't want any suit brought. I sat down and wrote the trans-

fer of the rolling-stock, and went out and got Mr. Uhl to sign it, and I inclosed it to Hardesty in a letter on the 20th of November.

(*Cross-examined:*)

Q. General, the paper dated November 20, 1878, called for an appraisement by competent persons, and its value to be credited on the bond of Coffroth, Sanner, and Uhl, held by Hardesty: was that appraisement made and credit given?

A. No, sir, it was not.

Q. Subsequently, to No. 37 January Term, 1881, Mr. Hardesty brought suit against you, Sanner, and Uhl, on the bond?

A. Yes, sir.

Q. You filed an affidavit of defense?

A. Yes, sir.

Q. In that affidavit of defense, did you claim credit for the rolling-stock which was assigned to him on the 20th of November, 1878?

A. No, sir, I didn't.

Q. Did Mr. Hardesty give in that suit credit for it?

A. He didn't.

* * * * * * *

Q. He got judgment for the balance which you admitted to be due?

A. Yes, sir; I admitted to be due on that bond.

Q. In that judgment there was no deduction on account of this rolling-stock?

A. There was no deduction on account of this rolling-stock.

* * *

(*R. S. Hardesty, deposition:*)

(Paper dated 20 November, 1878, above given, shown witness:) This belongs to me. I took it as collateral security on their bond, as my money had paid for the rolling-stock.

(*A. J. Colborn, witness for defendant, on the stand:*)

Q. What is your occupation?

A. Attorney-at-law.

Q. You are a member of the firm of Colborn & Colborn, are you not?

A. Yes, sir.

* * * * * * *

Q. State whether Mr. Hardesty ever sent this bill of sale, * * to you or your firm.

A. No, sir, not that I have any knowledge of.

* * * * * * *

Q. When did you receive the bond or note of Coffroth, Uhl, and Sanner, or the copy of it?

A. I received the bond I think, about the 5th or 6th of January, 1881.

* * * * * * *

Q. Did you receive a copy of it?

A. I received a copy of it prior to that.

Q. What time?

A. I think about the 23d or 24th of November, 1878.

Q. What was the date of the letter which enclosed it?

A. The 22d.

(*John O. Kimmel, witness for defendant, on the stand:*)

Q. State whether or not, in December, '78, you had any correspondence with R. S. Hardesty.

A. I got a letter from Hardesty, or rather from his attorney, and that was sent by Mr. Hardesty and written by his attorney.

* * * * * * *

Q. What was the date you received it?

A. I received it on the 27th of December, '78.

* * * * * * *

Q. State whether or not there was any enclosure in that letter.

A. There was.

Q. What did you do with the paper that was enclosed?

A. I gave it to Mr. Hay.

Q. At whose instructions did you hand it to Mr. Hay?

A. Mr. Hardesty's.

Q. On what day did you give that letter to Mr. Hay?

A. On the 2d of January, 1879.

The paper in question was the bill of sale. The letter directing its transfer to Mr. Hay was the letter of December 31, above given. The letter received December 27, 1878, above referred to, was addressed to J. C. Kimmel & Sons, who were bankers in Somerset.

The letter put in evidence by defendant is as follows:

"HARRY C. GAITHER,
"ATTORNEY-AT-LAW,
"NO. 48 LEXINGTON ST. BALTIMORE, Dec. 26, 1878.

"*Messrs. J. O. Kimmel & Sons:*

"GENTLEMEN,—Will you please do me the favor of recording the enclosed transfer, if you deem it necessary to do so? Do you

know of any way that a debt of $12,000 to $14,000 can be made out of the parties whose signatures are appended to the transfer (Coffroth and Uhl), as also Mr. Sanner? You will be paid for your trouble, of course, if anything can be done. What do you suppose the rolling-stock on the road is worth?

"Would the road pay by holding it—interest on the first mortgage bonds, I believe, about $3000 per year? I hold second mortgage bonds, $26,000, as collateral for the three parties' bond. You can state by postal card the expense of recording. I will remit to you upon receipt.

"Yours very respectfully,

"R. S HARDESTY,

"Per H. C. G."

(The instrument mentioned, not being acknowledged, could not, of course, be recorded under the laws of Pennsylvania.)

Upon the trial of this suit in the court below, the essential questions in controversy between the parties obviously were the following:

1. The question of fact, whether or not Hardesty, on December 16, 1878, had such a right of property and of immediate possession in and of the rolling-stock used on the S. & M. P. R. R., as would entitle him to maintain trespass against a Sheriff levying upon the same under an execution against the railroad company?

In the determination of this question, and respecting its submission and the manner of its submission to the jury, it was contended on behalf of the defendant below:

a. That, as a matter of law, the second S. & M. P. R. R. Co had been shown by unconflicting testimony to have acquired a certain proprietary interest in this rolling-stock, which thereupon became subject to the first mortgage, which had been placed by the first S. & M., and subject to which the corporators of the second S. & M. had purchased the road; and that, therefore, a levy upon the property on a judgment upon coupons secured by said mortgage was justifiable.

b. That the legal effect of the transactions between Coffroth, Uhl, and Sanner and the S. & M. P. R. R Co. respecting the

rolling-stock, was either that of a conditional sale, made absolute by the appropriation by Coffroth, Uhl, and Sanner of the bonds set apart for the purpose of covering those parties' original obligations in the purchase of the stock; or, that of a bailment determinable by re-possession by Coffroth, Sanner, and Uhl, only upon condition of the restoration of the bonds, or of their extinguishment as an outstanding indebtedness of the S. & M. P. R. R. Co., which condition entirely and admittedly failed; and that, therefore, no right of immediate possession could pass to Hardesty under the instrument of transfer dated November 20, 1878.

c. That this instrument, in effect, was but a conditional transfer, depending, in order to give Hardesty any title, upon his consenting to and joining in an appraisement, and upon his crediting the assignors with the value of the rolling-stock upon and in reduction, *pro tanto*, of their indebtedness to him under and by virtue of their bonds; that no act of acceptance having been done by Hardesty, but his subsequent conduct, as well as that of the assignors, showing a rejection of this condition, no title or right of possession passed to Hardesty under the instrument under which he claimed to recover damages in this suit.

The Court below was requested to charge the jury in accordance with these views, but declined to do so.

2. The question of law, whether or not, situated as this property was, even if, in fact, it was Hardesty's, a Sheriff executing a writ of *fi. fa.* against the S. & M. P. R. R. Co., in whose possession and use it was, could be held liable in trespass for levying upon and selling it.

The Court below was requested, in effect, to instruct the jury that there could be no such liability, but declined to do so.

3. The question of law, whether or not a Sheriff, levying merely upon the right, title, and interest of a railroad company, in property in its possession and use for the purposes of its busi-

ness, together with the remainder of the property, as an entirety, could be held liable in trespass by the party holding a proprietary interest in such property; and intimately connected with this:—

4. The question of fact, whether or not the Sheriff in this case levied upon and sold the property itself, or merely the right, title, and interest of the S. & M. P. R. R. Co. in the same.

The Court below decided as a matter of law that the Sheriff had levied upon the property itself, and was, therefore, liable to Hardesty, if the latter had title and right of possession.

5. Finally, the question of law, whether or not the agreement of January 8, 1879, and the decrees entered in pursuance of the same, estopped Hardesty, at all events, from maintaining an action of trespass against the Sheriff, the defendant below, and compelled him to assert his rights to the property, if any he had, by an action following the property itself in the hands of the purchasers of the road at the sales of January 2, 1879.

The Court below, in answer to this question, charged the jury that the agreement could have no such effect.

II.—ASSIGNMENTS OF ERROR.

1. The Court below erred in charging the jury in answer to defendant's tenth point, refusing the same, which point was as follows:

"If the jury believe the company issued a second mortgage, which was to be a lien on the rolling-stock acquired by the company, and issued the bonds under the mortgage, and that $24,000 of these bonds were to be used to pay the indebtedness Coffroth, Sanner, and Uhl had incurred in the purchase of the rolling-stock, and thereafter Coffroth, Sanner, and Uhl took these bonds and used them, then the bonds became a debt of the company, and extinguished the claim of Coffroth, Uhl, and Sanner, and the plaintiff acquired no such title by the transfer of November 20, 1878, as enabled him to maintain this suit, and the verdict must be for defendant."

The answer to which was as follows:

"This point is refused."

2. The Court below erred in charging the jury in answer to plaintiff's seventh point, affirming the same, which said point was as follows:

"That the depositing with Hardesty of a portion, to wit, $10,000 of the second-mortgage bonds set apart for the use of the new company in the manner testified to by the plaintiff and his witnesses, as collateral security for the individual debt of Coffroth, Uhl, and Sanner, was not such a sale of them as was contemplated by the resolutions of the Board of Directors, in pursuance of which they were issued, and this act did not transfer the ownership of the property in dispute from Coffroth, Uhl, and Sanner to the Somerset and Mineral Point Railroad Company."

The answer to which was as follows:

"This point is affirmed."

3. The Court below erred in charging the jury in answer to defendant's ninth point, refusing the same, which point was as follows:

"That, if the jury believe that the rolling-stock was purchased by Coffroth, Uhl, and Sanner on their individual responsibility, but that they surrendered the possession to the company, and the company used the property on its road with the marks of the company's owners put on them, and the money of the corporation was used to pay the rolling-stock or a part of it, and that Sanner, Uhl, and Coffroth so reported under oath to the State authorities, and further reported the rolling-stock as belonging to the company, then the transfer of Coffroth and Uhl to Hardesty passed no title."

The answer to which was as follows:

"If the jury believe from the evidence that Coffroth, Uhl, and Sanner, as individuals, purchased the rolling-stock for themselves, and gave their personal obligations for the price, and delivered the rolling-stock to the railroad company, to be used on the road,

the other facts in this point are not inconsistent with Coffroth, Uhl, and Sanner's ownership of the rolling-stock."

4. The Court below erred in charging the jury in answer to plaintiff's first point, affirming the same, which point was as follows:

"That, if the jury find from all the evidence that Coffroth, Uhl, and Sanner purchased the rolling-stock in controversy individually, gave their personal obligations or promissory notes for the price, and that in pursuance thereof the property was delivered to them, then the title and actual possession of the said rolling-stock vested in them as individuals, and not in the Somerset and Mineral Point Railroad Company."

The answer to which was as follows:

"This point is affirmed."

5. The Court below erred in charging the jury in answer to plaintiff's second point, affirming the same, which said point was as follows:

"That, if the jury find that Coffroth, Uhl, and Sanner allowed or permitted the Somerset and Mineral Point Railroad Company to take the rolling-stock in controversy on their road for a certain compensation in the way of rent, and that they reserved the right to take possession of it at any time they saw proper, that they did not thereby make the property liable to the debts of the old company secured by the first mortgage."

The answer to which was as follows:

"This point is affirmed."

6. The Court below erred in charging the jury as follows:

"The name adopted by the new company was the same as that of the old company, viz., The Somerset and Mineral Point Railroad Company. But these companies, while bearing the same name, were distinct corporations. The sale of the railroad did not extinguish the old corporation; it did not merge in the new company. The companies were two distinct coexistent bodies corporate."

7. The Court below erred in charging the jury as follows:

"The $50,000 mortgage of the old company, while containing a lien upon the railroad itself, did not attach to or bind this newly acquired rolling-stock."

8. The Court below erred in charging the jury in answer to defendant's third point, refusing the same, which point was as follows:

"That if the jury believe that Hardesty did not take possession of the rolling-stock, and had no possession at the time of sale, and that he did not have the appraisement made to fix the price, and never credited Coffroth, Uhl, and Sanner with anything on account of this transfer, and has since taken judgment against them without any credit, then the plaintiff had no such right of possession at the time of sale as will enable him to maintain this action."

The answer to which was as follows:

"This point is refused. The jury will determine from all the evidence in the case whether the plaintiff had the right of immediate possession of the rolling-stock in question."

9. The Court below erred in charging the jury as follows:

"Whatever rights these individuals (Coffroth, Sanner, and Uhl) had in this rolling-stock passed by the paper of November 20, 1878, to the plaintiff."

10. The Court below erred in charging the jury in answer to defendant's sixth point, refusing the same, which point was as follows:

"If the jury believe from the evidence that the rolling-stock was put upon the line of the S. & M. P. R. R. Co., and marked with the name of said company, and was in its possession and use at the time of the levy, and that the Sheriff did not know that the same belonged to Hardesty, and that he had any claim thereto, an action of trespass will not lie against him, even though he took possession of the same, for any act which he may have committed before notice of such claim; and if they find from the evidence that notice was not given to the Sheriff until the day of

the sale, and that thereafter the defendant merely sold the interest of the defendant company in the rolling-stock, that then plaintiff cannot recover in this action."

The answer to which was as follows:

"This point is refused."

11. The Court below erred in charging the jury in answer to defendant's eighth point, refusing the same, which point was as follows:

"That, if the jury believe the defendant never took possession of the locomotive and gondolas, and that the locomotive was not in his bailiwick at the time of sale of the road and its property, and that he merely sold the interest of the defendant company, and did not deliver possession to the purchaser, the plaintiff cannot recover damages for them."

The answer to which was as follows:

"This point is refused."

12. The Court below erred in charging the jury in answer to defendant's first point, refusing the same, which point was as follows:

"That, as the Sheriff levied on and sold the right, title, interest, claim, and demand of the railroad company in the railroad and its property, including the rolling-stock, if the jury believe that the use and possession of the rolling-stock and the operations of the road were not interfered with, the mere locking of the cars to prevent their removal from his bailiwick, after the locomotive had been so removed (an injunction having issued to prevent their removal), did not constitute him a trespasser."

The answer to which was as follows:

"This point is refused."

13. The Court below erred in charging the jury in answer to plaintiff's fourth point, affirming the same, which said point was as follows:

"That, if the jury further find from the evidence that the locomotive and cars described in the Sheriff's levy are the same property now in controversy, then, and in that event, the return of the Sheriff endorsed on the writ is conclusive evidence that he took possession and control of the property so levied upon December 16, 1878."

The answer to which point was as follows:

"The return is conclusive evidence against the defendant that he seized the engine and cars mentioned in the levy."

14. The Court below erred in charging the jury in answer to the plaintiff's fifth point affirming the same, which point was as follows:

"That, if the jury further find that Hardesty, the plaintiff, was the *bona fide* owner of the property on the 16th December, 1878, at the time of the levy mentioned in the fourth point, and then had the right to take immediate possession, the levy made by the defendant was a trespass, and the plaintiff is entitled to sustain this action."

The answer to which was as follows:

"This point is affirmed."

15. The Court below erred in charging the jury in answer to defendant's second point refusing the same, which point was as follows:

"That the agreement of 8th January, 1879, under which the possession of this rolling-stock was decreed by the Court to be delivered to the purchaser at Sheriff's sale, estops the plaintiff from suing the Sheriff in trespass *vi et armis*."

The answer to which was as follows:

"This point is refused."

III.—ARGUMENT FOR PLAINTIFF IN ERROR.

The questions raised by the several assignments of error in this case are substantially those indicated in the statement (*ante*, pp. 28–30), and may be conveniently considered under similar heads, these and the arguments upon them following the order of the assignments.

I. *The first contention is, that, on December 16, 1878, the date of the levy, Hardesty had no such right of property, or of immediate possession in or of the rolling-stock used on the S. & M. P. R. R., as could entitle him to maintain trespass against a Sheriff levying upon the same under an execution against said railroad company.*

This contention is based upon the following legal propositions:

1. *As a matter of law, the second S. & M. P. R. R. Co. had been shown by unconflicting testimony to have acquired a certain proprietary interest, or property, in this rolling-stock. This thereupon became subject to the first mortgage which had been placed by the first S. & M. P. R. R. Co., and subject to which the corporators of the second S. & M. P. R. R. Co. had purchased the road and organized their company. Hence a levy upon the rolling-stock, together with the rest of the company's property and franchises, under a judgment on coupons secured by that first mortgage, was proper.*

(*a.*) That the second S. &. M. P. R. R. Co., at the time of the levy, had possession of the rolling-stock in dispute, is not questioned. Do the facts of the case appearing in evidence establish, as a legal result therefrom, a right of property in the railroad company?

It is true, the rolling-stock was purchased by Coffroth, Sanner, and Uhl, and they gave their individual notes therefor. It may be true that they entered into an agreement among themselves, that, in placing the property on the road, they would reserve the right of re-possession at any time. It is not, however, in evidence that this reservation was insisted upon or mentioned by these parties, or consented to by the company at the meeting when the property was transferred to the company. All

that was asked on the one side, and conceded on the other, was that the company should assume something that might be considered as an equivalent for the use of the property until the title should become absolute in it, to wit, that it should pay the interest on the sum invested, and bear the expense of keeping the rolling-stock in repair. But, be that as it may, it is unquestioned that the agreement between the company and Coffroth, Sanner, and Uhl, contemplated the acquisition of the stock by the company as its absolute property; that it was agreed that the company should make provision for the payment of the rolling-stock, and that, upon payment thereof, it should belong absolutely to the company; that for this purpose the Directors authorized the execution of a mortgage for $45,000, especially purporting to be a first mortgage on this rolling-stock, and directed, that, after giving to each of the three parties $7000 of the bonds secured by the mortgage (to reimburse them for their original outlay of $22,050 in the purchase of the road), the remaining bonds, amounting to $24,000, should be placed in the hands of one of them, who was also Treasurer of the company, which, when realized on, should be payment to Coffroth, Sanner, and Uhl, and perfect the title of the company to the rolling-stock; and that this mortgage was executed and the bonds so placed—$7000 to each of the three parties, $24,000 in the hands of Michael A. Sanner, to be applied in payment of the rolling-stock.

Here, then, was a conditional sale of this rolling-stock to the S. & M. P. R. R. Co. It was in possession. It was not, as a matter of law, in possession as lessee—for all the essentials of a lease are wanting in the contract (and it is to be observed, that, in the annual reports, no item is given as "rent," though there are items of "repairs" and "interest")—but as conditional vendee. The completion of its title depended upon the conversion of the $24,000 for the benefit of Coffroth, Sanner, and Uhl. They were entitled to have them sold, or to sell them, and to receive the proceeds in money. They might leave them untouched and retain their title to the rolling-stock. They might realize upon them in part, and to that extent their title would be extinguished. It was competent for them, the company not objecting,

to take the bonds themselves, to waive the right of having them sold, and to appropriate them *in specie*. The indebtedness, to provide for which the bonds had been set apart, was the indebtedness of the company to Coffroth, Sanner, and Uhl. With the indebtedness of Coffroth, Sanner, and Uhl to the manufacturers of the rolling-stock the company had no concern. If Coffroth, Sanner, and Uhl were paid—and to the extent to which they were paid—the stock belonged to the company, quite irrespectively of the questions whether or not Coffroth, Sanner, and Uhl paid the manufacturers, or whether or not the latter allowed their claim against the former to remain unpaid, or whether or not Coffroth, Sanner, and Uhl, having received payment from the company, still borrowed elsewhere the money to pay the manufacturers.

Now, the undisputed evidence in the case shows that Coffroth, Sanner, and Uhl, instead of allowing the bonds to remain with Sanner to be sold, elected to take them out of his hands and convert them to their own use, pledging them to Hardesty as collateral security for the advance to them of a sum which they applied to the extinguishment of their own individual indebtedness to the manufacturers of the rolling-stock. It would seem that the legitimate effect of this transaction—in which Coffroth, Sanner, and Uhl were the actors, the company observing a merely passive, permissive attitude—was to perfect the title of the company to the rolling-stock, to extinguish its indebtedness to Coffroth, Sanner, and Uhl under the oral agreement, and to create in lieu thereof a bonded indebtedness to Coffroth, Sanner, and Uhl, and subsequently to Hardesty, their transferree. That this view was, at the time, thoroughly understood and held by Coffroth, Sanner, and Uhl, as individuals and as officers of the company, is shown by the fact that the sworn annual reports to the Auditor-General of Pennsylvania, made under their personal direction, subsequently to December, 1875, when the transaction with Hardesty occurred, declared that the S. & M. P. R. R. Co. was free from floating debt; that all it owed was its funded indebtedness, secured by the two mortgages. If the company, after the appropriation of the bonds by Coff-

roth, Sanner, and Uhl, still owed the latter parties for the stock, that deliberate sworn statement was a deliberate sworn falsehood. If, on the other hand, the only indebtedness of the company to Coffroth, Sanner, and Uhl was the $24,000 of bonds held by them, and subsequently pledged by them to Hardesty, then the bonds must have been taken in payment of the stock, substituted for the indebtedness on the stock, and the stock belonged to the company, whilst it owed the bonds to Coffroth, Sanner, and Uhl's assignee.

But if, in the absence of evidence that the value of the bonds at the time of their appropriation by Coffroth, Sanner, and Uhl was equal to their claim upon the company, it should be deemed equitable to allow that appropriation to have the effect of payment only to the extent of their then value, the argument for the purpose of this case is not materially affected thereby. What this value was, does not appear by any direct evidence in the case. It is stated in the annual reports (uncontradicted in this particular) that the interest was regularly paid upon them. It is undisputed, also, that the loan from Hardesty was secured in part, at least, upon the faith of these bonds, pledged to him as collateral security. To the extent, therefore, to which these bonds were the source of the money that paid off the individual indebtedness of Coffroth, Sanner, and Uhl to the manufacturers of the rolling-stock—and as it is clear that, to some extent, they were so, the precise extent seems immaterial—the S. & M. P. R. R. Co. must be held to have repaid Coffroth, Sanner, and Uhl—to have acquired a proprietary right in the rolling-stock—to have become at least the co-owner of the stock with Coffroth, Sanner, and Uhl.

There is another feature in the case which leads to the same result. The sworn reports to the Auditor-General show that a very considerable sum of money, taken from the net earnings of the road, went into the rolling-stock as purchase-money. Thus, in the year 1875, the item "for construction and equipment" is $4400.81, which is said to have been taken "from earnings of road, and applied to equipping the road with rolling-stock." This is independent of the expenses for repairs to the engine and

cars, which, in that year, did not exceed, according to the report, $170. It is independent, also, of all payments for interest, to wit, $3519.50. But the witnesses called by plaintiff, among them the gentlemen who swore to that report, deny its correctness—deny that anything at all was paid "for construction and equipment" in that or any subsequent year. It is admitted, however, that large sums were taken from the earnings to pay for repairs to the rolling-stock. It is also admitted that interest was paid by the company. The sums thus expended are claimed to have been paid under the alleged contract of bailment as "rent." But that agreement, as testified to by plaintiff's witnesses, cannot, under the most liberal construction, be regarded as involving any duty to make repairs beyond such as were needed to keep the property *in statu quo*. It appears, however (and the damages given in this case were based upon the testimony of plaintiff's witnesses to this effect), that the repairs put upon, or rather alterations made in, the engine, in one instance, were such as to increase its value $1000 above what it was originally worth. To do this was no part of the company's duty. It was not the act of a lessee, but of an owner. Or, grant that the company was lessee, and Coffroth, Sanner, and Uhl lessors. They were also the managing officers of the company. They sustained the relation of trustees towards it and its creditors in respect of its funds coming under their control. Their own theory, then, shows them in the light of trustees withdrawing $1000 of the mortgaged earnings of the road, and investing them in improvements to their own private property in their own possession as officers of the company. Equity would require that the company be, to that extent, deemed to be the co-owner of the property, and that the latter be to that extent subjected to the lien of the mortgage. Similar is the testimony as to the passenger coach and baggage car. In every instance the "repairs" put upon them, out of the company's pocket, enhanced their value beyond what it had been when first put upon the road. And these repairs were made in 1876, and the repairs made after that time were such, in accordance to plaintiff's evidence, as to keep up this increased value to the time of the levy in 1878.

Finally, it is admitted that the interest that Coffroth, Sanner, and Uhl paid Hardesty was taken out of the earnings of the road. The interest thus paid was usurious, and this usurious excess during the first two years of the loan was, in the suit of Hardesty on the bond, credited as payments on the principal thereof. The reduction of the principal debt, by reason of this, amounted to $1390. Clearly, then, that amount was, beyond the possibility of dispute, paid by the company upon the rolling-stock before November 20, 1878, and has been received by Coffroth, Sanner, and Uhl, and to that extent it was co-owner of the same with them.

(*b.*) If the second S. & M. P. R. R. Co. acquired any proprietary interest or ownership in the rolling-stock, the question next arises, Was it covered by the first mortgage?

It is contended by plaintiff in error that this question must be answered in the affirmative. The acts of 1861 and 1867, under which the corporators of the second S. & M. P. R. R. Co. purchased the road and organized their company, have been given. (*Ante, p. 2.*) Their construction and effect in Pennsylvania are scarcely doubtful. In *Commonwealth vs. Central Pass. Ry. Co., 52 Pa. St., 506,* where the act of 1861 and its operation are elaborately examined, it is said by Mr. Justice STRONG, that a case arising under this law (of which the act of 1867 is but an extension) "is not to be confounded with the case of an original grant of corporate rights;" "the corporate franchise was in existence when the sale was made;" "the sale did not work its extinguishment;" but "the franchises shall vest in the purchaser or purchasers, and he or they shall be a body corporate, and seized of all the rights, powers, privileges, and franchises of the corporation of whose property they became the purchasers," and they take the franchise "by succession."

Such was the relation of the second S. & M. to the first S. & M.

Now, the first S. & M. mortgaged for the payment of $50,000 all its "present and future to be acquired property, the roads made and to be made, the tolls, rents, or income to be had and levied therefrom." Not only what it possessed by virtue of the franchise granted to it by the State, but whatever property should

thereafter be acquired by virtue of that franchise, was made subject to the mortgage. That identical franchise was, by the act of law, transferred to the second S. & M. The lien of the mortgage was expressly preserved in full force and effect. This mortgage, therefore, extending over and embracing everything that could be acquired by virtue of the franchise originally granted to the first S. & M.—being co-extensive, in every respect, with said franchise—and the second S. & M. merely "succeeding," by statutory heirship, to that identical franchise, acquiring and holding whatsoever property it could acquire and hold by virtue of that same franchise originally granted to the first S. & M., it follows with logical necessity that whatsoever property was acquired and held by virtue of the same, though called by a different name, was covered by the mortgage. In this sense, the two companies cannot be regarded as separate and distinct existences. Indeed, except for the purpose of winding up its affairs, it cannot, in any proper sense, be said that, by the sale, the old company was not extinguished or merged in the new one; that the two companies continued as two distinct coexistent bodies corporate. There is no warrant for any such construction in the decisions of the Pennsylvania courts. It is, indeed, said (*Commonwealth vs. Central Pass. Ry. Co., supra,*) that the *franchise* is not extinguished; but it is also said, that, by the sale, that franchise passes at once to the purchasers. There remains, therefore, nothing to the old company that could preserve its life as a corporation. Its franchise is taken from it, and with it goes the capacity to hold property or to do any corporate act; its property is gone; its very name may be assumed by its successor. The utmost extent to which it retains vitality and corporate existence goes just so far as is necessary to wind up its affairs. In every other sense, it is extinguished and merged in the new company. It does not follow, nor is it the law, that the debts of the old company are to be visited upon the new, except in so far as they may be assumed by it; for the price paid for the transfer of the franchise and property is the fund appointed by law for the creditors to look to. Yet, where the transfer is made, pending an action against the old company for damages occasioned to

plaintiff's property by the construction of the company's works, the new company is sufficiently identified with its predecessor to be liable to be made a party to the action: *Lycoming Gas & Water Co. vs. Moyer, 1 W. N. C., 443 (Supr. Ct., Pa.).*

The same result is reached by the application of the familiar doctrine that the property of a railroad company in use for the purposes of its franchise is an entirety, incapable of dismemberment or separation. It all goes to make up the value of the stock—the value of the franchise. Clearly, every car added to the rolling-stock increases the value of the whole property. The future value of the property then held by the first S. & M. being pledged by the mortgage executed by it, and the second S. & M. succeeding to its franchise and property so pledged, and recognizing such pledge, every addition made to the value of the property is covered by the mortgage, *i. e.*, every car added, every improvement made, every increase in the property used in exercising the franchise, must be regarded as embraced in the mortgage, as being simply accessions, accretions to its property *in esse* at the time it and its future value were mortgaged. The analogy is thus complete with (and upon the contrary hypothesis there would be a strange incongruity between the case of a railroad mortgage and that of) a mortgage by an individual upon his real estate. In the latter case, if the heir to land, subject to a mortgage, improves the property by additional buildings, &c., he simply adds to the value of the security, and has never been heard to complain if the mortgagor so regards and treats them. There is no greater unity between real estate and the fixtures upon it, than between all the integral parts of a railroad; and the new corporation, under the acts of 1861 and 1867, bears to the old company precisely the same relation as the heir to his ancestor.

Both the views here contended for are amply sustained by judicial decisions of respectable authority.

In *Hamlin vs. Hayford, 72 Me., 62; 4 Am. and Engl. R. R. Cas., 488,* a railroad, which had been made subject to a mortgage in every respect similar to that of the first S. & M., became, by virtue of an act of the Legislature and articles of con-

solidation, consolidated with and merged in a company bearing a new name. This new company determined upon a change of gauge. Some of the old rolling-stock in use on the road subject to the mortgage was by the consolidated company withdrawn, and supplied by new, or improved and repaired. It was held, in a contest between the representatives of the said mortgage, and those of a new mortgage of similar character given by the consolidated company, that the first mortgagees were entitled to all the old and new rolling-stock as covered by their mortgage; that the repairs and improvements made by the new company were in the nature of accessions to a mortgaged chattel, and subject first to the mortgage that had priority of date.

"The consolidated company assumed the debts of its several parts, and recognized the prior liens upon them. It assumed also, by force of law, the burden of having any increased value of the road and its appurtenances go as security, first, for those prior liens. It cannot claim that its duty was merely to keep them in *statu quo*, and that, as against the first mortgagees, additions and improvements belong to itself as a distinct entity."

To the same effect is *Meyer vs. Johnston, 64 Ala., 603; 8 Am. and Engl. R. R. Cas., 584.*

That the property was purchased and held in the name of individuals, officers of the company, and not by the company itself, is, if the company is the equitable owner, of course, immaterial as bearing upon the question of its subjection to the mortgage: *Boston, etc., R. R. Co. vs. Coffin, 12 Am. and Engl. R. R. Cas., 375.*

2. *If the legal effect of the transactions between Coffroth, Sanner, and Uhl and the S. & M. P. R. R. Co. respecting the rolling-stock was not that of a conditional sale made absolute, in whole or in part, by Coffroth, Sanner, and Uhl's appropriation of the $24,000 bonds, it was that of a bailment determinable by Coffroth, Sanner, and Uhl only upon condition of the restoration of the bonds or of their extinguishment as an outstanding indebtedness of the S. & M. P. R. R. Co.*

Suppose the contract between Coffroth, Sanner, and Uhl to

have amounted merely to a bailment, not to a sale. It was, at least, a bailment with an option of purchase in the bailee. The time within which the option was to be perfected was not limited. It is not denied that the (supposed) bailee made preparations for payment. It set apart, with the consent of the bailors, a certain number of bonds, manifestly deemed adequate by both parties, and placed them in the hands of Sanner. The reservation, if such there was, to Coffroth, Sanner, and Uhl, of a right of immediate repossession at any time, was predicated upon a condition of affairs in which it was consistent with equity and fair dealing. It did not contemplate an appropriation by them of the bonds, or the value of the bonds, and also the privilege of at any time seizing the rolling-stock, leaving the company without its bonds and without rolling-stock, and yet with a liability to pay an outstanding indebtedness created for the purpose of acquiring, of being an equivalent for, the rolling-stock. In other words, the retention of the bonds by Sanner, who, whilst he was one of the bailors, was also the Treasurer of the company, was an essential part of the condition of things upon which the right of repossession was based, and without which it would have been monstrous. This *status* was disturbed by the act of Coffroth, Sanner, and Uhl. Their act deprived the company of the control of the bonds, of the stipulated source from which the money to pay the stock was to be raised. By this act it was made impossible for the company to perfect its option. The parties had agreed that it should be perfected in a certain way, and the act of one of them could not compel the other to adopt another course. The option, therefore, could not be taken away from the company, nor its possession under the bailment disturbed by Coffroth, Sanner, and Uhl, without a restoration of the *status quo*—a return of the bonds, or at least an extinguishment of the company's liability upon them. In the absence of either on November 20, 1878 (and there is no pretense to the contrary), Coffroth, Sanner, and Uhl had no right of possession which they could have conveyed to Hardesty.

3. *The instrument dated November 20, 1878, was, in effect, but a conditional transfer, depending, in order to give Hardesty any*

title, upon his consenting to and joining in an appraisement and upon his crediting the assignors with the value of the rolling-stock upon and in reduction, pro tanto, of their indebtedness to him under and by virtue of their bond. No act of acceptance having been done by Hardesty, but his subsequent conduct, as well as that of the assignors, showing a rejection of this condition, no title or right of possession passed to Hardesty under that instrument.

Hardesty's right to maintain this action is based upon the paper dated November 20, 1878, given in full on pages 24–25. Under it, even if Coffroth and Uhl (having succeeded to Sanner's rights) had both the ownership and the right of immediate possession of the rolling-stock, Hardesty acquired neither the one nor the other.

Coffroth, Sanner, and Uhl, in 1875, gave Hardesty their bond payable in November, 1877. At that time Coffroth and Uhl went to Baltimore to see Hardesty, and if possible obtain an extension. They made certain representations to him concerning the rolling-stock, and offered to assign it to him as collateral security, if he so desired. What was said by Mr. Hardesty does not appear. At any rate, no such transfer was then made, nor was the bond pushed by Hardesty, at that time. A year later, on November 20, 1878, after judgment had been obtained against the S. & M. on coupons of the first mortgage, and when an execution was, to say the least, imminent (the circumstances point strongly to the conclusion that the date, November 20, 1878, was put on the paper, and the paper drawn and mailed several days later, in fact after the levy of December 16, 1878), Coffroth and Uhl, "in pursuance" of that conversation with Hardesty in Baltimore, execute a bill of sale to him of all this rolling-stock, to be appraised at its fair value and at such to be in payment of the debt *pro tanto*. Hardesty, four or five years after, testifies that he took this as collateral security. At the time he did nothing. No appraisement was made—no credit was given to Coffroth and Uhl—but a suit was brought against them by Hardesty on November 18, 1880, for the recovery of the bond, quite ignoring the transfer of the rolling-stock. An affidavit of defense filed in the action claims a number of credits—

conceded by Hardesty—but none for the value of the rolling-stock. For the difference judgment is entered by consent.

Now, what, in law, was this transfer? Its being absolute in its first clause can make no difference. The intention is to be gathered from the whole instrument; and the intention of a party to a written instrument is to be gathered from it by the Court, as a matter of law, not by the jury as a matter of fact.

Taking, then, all the terms of the instrument, what is its effect more than an offer on the part of Coffroth and Uhl to Hardesty to give him this stock at a figure to be ascertained by appraisement, in part payment of their debt? What is it but a conditional sale, dependent for its effect in passing title to the property sold, upon the acceptance of its terms and performance of its conditions by the vendee? And whilst both the fact of acceptance or non-acceptance, and that of performance or non-performance, would ordinarily be for the jury, yet where the facts are uncontroverted, it becomes the duty of the Court to pass upon their legal effect, and to decide, whether, in point of law, they do, or do not, show acceptance and performance; for, where the evidence is all one way, the Court need not submit the question to the jury: *U. S. vs. One Still, 5 Blatchf., 403.* All there remains to be done is for the Court to declare the law resulting from the facts thus shown: *Towers vs. Ingraham, 3 Barb. (N. Y.), 576; Millbank vs. Dennistown, 21 N. Y., 386; Ramage vs. Peterman, 25 Pa. St., 349; Thornton vs. Lane, 11 Ga., 459; Hedgepeth vs. Robertson, 18 Tex., 858.* Indeed, it would seem, that if there is one point concerning the relative functions of judge and jury more satisfactorily settled than any other, it is, that, in such a case, the highest obligation of judicial duty requires the judge to instruct the jury for whom to find: *Koons vs. Steele, 19 Pa. St., 318; Lindsay vs. Lindsay, 11 Vt., 621; Pood vs. Whitney, 27 Me., 480; Haynes vs. Thomas, 7 Ind., 38; Gillespie vs. Battle, 15 Ala., 276; Swartzwelder vs. U. S. Bank, 1 J. J., Marsh. (Ky.), 38; Reid vs. Reid, 11 Tex., 585; Bond vs. Mallow, 17 Id., 623, etc.;* and that it is error to submit such facts to the jury: *Scott vs. Clayton, 54 Wis., 499.* Now, disregarding the statement of plaintiff that he "took" the bill of

sale, which amounts to nothing, the facts, as shown by the evidence of plaintiff's witnesses conclusively establish that Hardesty did not accept the transfer in the sense and for the purpose in and for which it was made. He gave no equivalent for it. He took no action upon it--allowed no credit for it—but brought a suit directly in disaffirmance of it. Nor did Coffroth and Uhl consider themselves as entitled to any benefit by reason of it. They conceded Hardesty's right to reject their offer, and claimed no credit in the suit against them on the ground of the transfer. It is idle to say that the latter was made in pursuance of the conversation had a year previously. That was with reference to the collateral security. No appraisement was contemplated or needful for that. This was a transfer to be absolute if and when accepted in the sense it was intended—a payment, not a pledge. It passed no title, no right of possession, until fully complied with. Thus A, being indebted to B, conveyed to him by bill of sale, *bona fide* executed, all his stock in trade, household furniture, etc., absolutely. The bill of sale contained a covenant by A to pay the debt on demand, a proviso for redemption on payment thereof with interest on demand, and a further proviso that A should continue in possession until default. Before demand by B, the property was seized by the Sheriff under a *fi. fa.* against A. It was held B had not such a right of immediate possession as to entitle him to maintain trover against the Sheriff: *Bradley vs. Copley, 1 C. B., 685.*

The assignments of error raising the questions discussed, under this head, are the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th. A few special observations may be added with reference to some of these.

1st Assignment.—The Court, in the prayer recited, was asked to give construction to an oral contract, the evidence of which was undisputed, and to declare the legal effect of acts testified to as done under that contract, leaving it to the jury to pronounce whether or not the acts were done. There can be no question that, the terms of an oral contract being proved, its construction, its legal effect, is to be declared by the court: *Short vs. Woodward, 13 Gray (Mass.), 86; Sellars vs. Johnson, 65 N. C., 104;*

Gowan vs. Kehoe, 71 Ill., 66; White vs. Murtland, Ibid., 252; Pendleton vs. Jones, 82 N. C., 249; including the effect of a subsequent contract on a prior one: *Cocheco Bank vs. Berry, 52 Me., 293.* More especially is this so, where, as in this case, the contract is shown by the testimony of plaintiff alone and the question is one of interpretation: *Dezenback vs. Stark, 56 Wis., 462.* And a party is entitled to a charge as to the legal result of evidence, if believed: *Clark vs. Tabor, 28 Vt., 222.*

2d Assignment.—In the answer here assigned, the Court, at plaintiff's request, does the exact reverse of what, in the prayer recited in the first assignment, it had been asked by defendant to do. If the terms of the contract between Coffroth, Sanner, and Uhl and the S. & M. P. R. R. Co. were not so clearly and precisely proven as to enable the Court to pronounce the transaction a sale, the testimony was certainly not clear and precise enough to permit it to give them any other specific effect; but the question became one of intention for the jury. Thus it has been decided, that, where the evidence leaves it uncertain whether the parties to an oral contract meant it to be a sale or a bailment, the question is one for the jury, which is to declare the intent of the parties from the interpretation put on it by them, in the light of the evidence of their circumstances and situation: *Reissner vs. Oxley, 80 Ind., 580.* To a like effect is *Clendenon vs. Pancoast, 75 Pa. St., 213.* Besides, the point and answer assume that only $10,000 of the bonds were pledged with Hardesty—a figure for which there is no warrant in the testimony. The only positive evidence there is as to the amount, fixes it at $26,000.

3d Assignment.—The answer assigned as error, negativing the prayer recited, makes the whole question of the ownership of the rolling-stock depend upon the single fact that Coffroth, Sanner, and Uhl originally purchased and gave their individual obligations for it. Whether they subsequently entered into an agreement with the company to transfer the title to it, upon payment by it of those obligations, and whether this took place—these matters, according to this ruling, are of no moment whatever. Though the company may have paid the notes, &c., under such an agreement, that would give it no claim upon the stock, if only

those notes were originally signed by Coffroth, Sanner, and Uhl, and although not a cent of their money was used in discharging them. The Court below probably did not mean to say this, but it said it, and the jury was bound by it. The error is aggravated by the answer next assigned.

4th Assignment.—Substantially the same startling proposition is embodied in the plaintiff's first point, and affirmed by the answer here assigned.

5th Assignment.—This point and the answer of the Court entirely ignore all the transactions, contracts, etc., subsequent to March 6, 1875. Moreover, there is no evidence whatever that there was a *certain* rent reserved, or that there was, in the agreement between Coffroth, Sanner, and Uhl and the company, any reservation of a right of repossession in favor of the former parties. The evidence is that the company was simply to pay interest and repairs, which, in the nature of things, could *not* be a certain rent; and that the talk about the right of repossession was among Coffroth, Sanner, and Uhl themselves, not between them and the company. (*Ante*, pp. 4–5.)

8th Assignment.—It will be observed that the instruction here prayed for was a declaration of the legal effect of a written instrument and of the rights and duties of the parties under the same. The answer leaves the construction of this writing to the jury in the light of "all the evidence in the case." The prayer was also for instruction as to the legal result of certain evidence (of acts and omissions of Hardesty), if believed. To such a charge every party asking for it is entitled as a matter of right: *Clark vs. Tabor, 28 Vt., 222.*

II. *The second contention is, that a Sheriff executing a writ of fieri facias against the S. & M. P. R. R. Co. could not be held in trespass for levying upon and selling this rolling-stock under the circumstances in which the defendant below found it.*

As to what these circumstances were, there is no dispute in the evidence. The rolling-stock had been put upon the S. & M. P. road in 1875, marked as the property of the defendant company, which owned the road; had been used and controlled by that

company from that time continuously down to the date of the levy; had been kept in repair and improved by it; had been proclaimed, in the reports of the President of the company to its stockholders and the public and in the sworn returns to the Auditor-General of the State, as the property of the railroad company. It was the only rolling-stock on the road, and was in actual use for the business of the road at the time. There was absolutely nothing to insinuate to the Sheriff the possibility of its being the property of any person but the company. That such it was, there was an abundance of evidence patent to his eyes. The mere fact of possession was *prima facie* evidence of ownership: *Goodwin vs. Garr, 8 Cal., 615; Vining vs. Baker, 53 Me., 544; Fish vs. Skut, 21 Barb. (N. Y.), 333; Entriken vs. Brown, 32 Pa. St., 364.* Situated as this property was (assuming title in Hardesty), part of the working property of a railroad, incapable of dismemberment—apparently the property of the railroad company—in its actual use and appropriate and necessary to its franchise, it was so intermingled with that which the company unquestionably owned, that the doctrine of confusion of goods would seem clearly to apply in complete exoneration of the Sheriff erroneously seizing the whole.

Thus it has been held, that, where the goods of A are intermixed with the goods of B, and the Sheriff, by virtue of a writ against B, takes the goods of A and B, which are so intermixed, the Sheriff cannot be considered as a trespasser for taking A's goods, although the goods have been so intermixed without A's assent: *Lewis vs. Witter, 5 N. H., 364.*

The same doctrine is stated in *Kneeland, on Attachments*, §470, where it is further said: "The Sheriff has a right to attach all the defendant's property, and this right should not be abridged through fear of taking property of third persons, that has been ingeniously mixed up with it."

Again it has been held, that, where the goods of a third party are mixed with the property, *or in the apparent possession*, of the judgment debtor, the Sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to de-

liver. *Daumiel vs. Gorham, 6 Cal., 43; Bond vs. Ward, 7 Mass., 123.* And to the same effect is *Robinson vs. Holt, 39 N. H., 557.*

Nor is the officer required to refrain from making the levy on the mere disclaimer by the execution debtor of interest in the property, this being not enough to put him upon inquiry as to rights of a true owner: *West vs. St. John, 63 Iowa, 287.* Nor is he bound to notice the bare assertions of individuals as to their claims to property in the possession of a defendant in an execution; he is only required to notice legal claims fairly exhibited: *Dunlap vs. Berry, 5 Ill. (4 Scam.), 327.*

In the present case there is no pretense that any notice was given to the Sheriff of Hardesty's claim prior to the day of sale, and the weight of evidence is that it was given at the sale. The form of the notice was a "bare assertion" that the property belonged to Hardesty (*ante*, p. 16). There is no evidence that a copy of the transfer accompanied it, nor was the transfer on record. It contained no demand for the articles. There was no refusal to deliver them. The sale was merely of the interest of the defendant railroad company in them, and they were not delivered to the purchaser. The cars were simply unlocked, to be taken by any person that dared to do so. The trespass sued for was in the *levy*. The notice, such as it was, was given half a month *after* the levy. When it was made the Sheriff was justified, under the decisions quoted, in making it, and no action accrued to Hardesty on account of it. It certainly will not be claimed that the notice (assuming it to have been a proper and sufficient one) retroacted in such a manner as to constitute that a trespass which was a justifiable act when committed.

It was, however, not only justifiable in the Sheriff to levy on the entire property in the use and possession of the company, but it was his imperative duty to do so. The rules circumscribing the subjects of a levy under an execution against a railroad company are too familiar to require the citation of authorities. The road cannot be dismembered. The levy must be upon the whole property and franchise, where the whole of the property

is in use for the purposes of the franchise. It cannot be on the rolling-stock without the road and its appurtenances; nor can it be on the road without the rolling-stock. The Sheriff, then, in this case, finding this railroad company in possession of a road, certain buildings, implements, and rolling-stock, could pursue but one course, viz., levy upon the entirety. Of course, nothing could pass, by virtue of the levy, to his vendee except the interest of the execution-defendant; but whatever that interest was—whether it was property in the whole or in any portion of any particular article—whether it was absolute or conditional ownership—whether it was a right of possession for a definite or indefinite time—whether it was under a lease for ninety-nine years or at will—the Sheriff was bound to embrace it in his levy. Can it be possible that the law will so stultify itself as to command the Sheriff to do this, and in the same breath impose a penalty upon him, if, in obeying that command, he unwittingly attaches property in the possession, use, and apparent ownership of the railroad company, of which a third party subsequently appears to advance a secret right of possession?

III. *The third contention (related to the one next following as the major to the minor premises) is that a Sheriff levying merely upon the right, title, interest, and claim of a railroad company in and upon property in its possession and use for the purposes of its business—the whole, interest and property, being levied on as an entirety—cannot be held in trespass by the party actually owning the property.*

Even if Hardesty had been in possession of the rolling-stock, under his alleged pledge of the same as collateral security, the interest of the railroad company in the stock might have been levied on and sold by the Sheriff, and if that interest was only a supposed one, nothing would have passed to the purchaser.

The interest of a pledgor of personal property may be seized in execution and sold: *Earley vs. Withers, 1 Pearson (Pa.), 248.*

The interest of a mortgagor of goods in the hands of his mortgagee may be levied on and sold, provided the possession of the mortgagee, for the purpose of satisfying his claim, be not interfered with: *Woodside vs. Adams, 11 Vt., 417.*

Much less is there any doubt, that, while the mortgagor retains possession of goods, they may be seized under an execution against him, and his interest in them sold to satisfy the judgment debt. The most recent judicial expression to this effect is probably that of the Court of Chancery of New Jersey, on January 25, 1886, in *Fox vs. Cronan*, reported in *2 Central Reporter, 265*.

The proposition here contended for being beyond the possibility of serious controversy, connects itself with—

IV. *The fourth contention, viz., that, in this case the Sheriff's levy was, in point of fact and law, not upon the property itself, but upon the right, title, interest, and claim of the S. & M. P. R. R. Co. in and upon the same.*

The evidence of what was done by the Sheriff is in his return and in the testimony (admitted without objection) as to the circumstances surrounding the levy. (*Ante*, pp.14–18.)

Excluding all testimony upon the subject, and regarding the return itself (1) as conclusive upon the Sheriff, and (2) as the subject of construction by the Court alone—upon what does it show the levy to have been made? The first and most striking peculiarity in the phraseology of the return is, that here was a levy intended, not on *property* of the execution defendant, but upon its *right, title, interest, and claim in and upon* certain property. The words "*of, in, and to*" are opposite words to "right, title, interest"; the word "*upon*" is appropriate to the word "claim." The main purpose as to the intended subject of the levy being indicated by the first words of the return, "levied upon all the right, title, interest, and claim of the S. & M. P. R. R. Co.," the remainder of the clause ought to be construed in relation to and dependency upon these words, if it can be done. The Court below excluded this construction, and treated the return as capable of but one meaning—levy upon the right, &c., in the road; but levy upon the property itself—intimating that the phraseology would have been different if the intention had been different. It is submitted that if the return were in fact intended to bear the construction put upon it by the Court below, "also" or "further" would have been used in the place of "and."

The closest grammatical construction makes the words "upon all the property," connected with the preceding clause by the copulative "and," bear the same relation to "claim" as the words "of, in, and to the S. & M. P. R. R." bear to "right, title, and interest." Nor is there any reason in the present case, upon its merits, for rejecting this most obvious construction. The Sheriff, it was claimed by plaintiff below, was bound by his return and could not contradict or explain it, whatever construction the Court might put upon it. Hardesty, however, was certainly under no such disability. If the construction given the return by the Court made it speak an untruth, Hardesty was at liberty to contradict it: *McGough vs. Wellington, 6 Allen (Mass.), 505; Mentz vs. Hamman, 5 Whart. (Pa.), 150.*

It is, however, not clear that the construction of this return is a matter for the Court alone. Manifestly, it is fairly open to two constructions. The evidence in the case shows that one of these constructions is in accordance with the facts as they actually occurred, the other, opposed to them. It follows that the return can be properly construed only by calling in the aid of the surrounding facts, and that, therefore, it should have been left to the jury to decide, upon the evidence of the return and of the accompanying testimony, whether or not the Sheriff levied upon the property itself or merely upon the interest of the railroad company in it. Thus it was held, that, whether an ambiguous writing was a direct undertaking or a guaranty, might properly be left to the jury: *Philibert vs. Burch, 4 Mo. App. 470;* that, whether the grant of a "road" denoted only a right of way "for the same purposes for which it was used by the grantor at the time of the conveyance," was a question for the jury: *Cole vs. Sprowl, 35 Me., 220;* that, when the terms of the levy, from which the quantity of land passing by the Sheriff's deed is to be ascertained, left that quantity uncertain, it was a question for the jury: *Hoffman vs. Danner, 14 Pa. St., 25.*

The testimony alluded to is uncontradicted, and its effect cannot be doubtful. In point of fact, nothing was done, in levying on the company's interest, but what is expressly sanctioned in *Woodside vs. Adams, supra,* and *Fox vs. Cronan, supra,* viz., the

Sheriff merely inventoried, appraised, and advertised the property. He in no wise interfered with the rights of Hardesty. The fact that he locked the wheels (a fact, which, it seems, the Court below allowed to control its construction of the return) under the circumstances he explains—to prevent their removal in violation of an injunction in his hands, and after the locomotive had been so removed—was not inconsistent with this assertion, and would not have been so if the cause which induced him to do it had been wanting. He found the execution-defendant in possession of the rolling-stock. He levied upon its interest. Whatever else that might be, visibly and primarily it consisted of the right to use the same. That right in point of fact it had—there is no dispute as to that. The Sheriff, by locking the cars, interfered only with the right of the company to use them. There is no evidence that the plaintiff was prevented thereby from exercising any control over them that he actually attempted or was in a position to exercise. And surely, the mere surmise, that, had he offered to do so, he would have been prevented or treated as a trespasser, is too shadowy an infraction of his rights to be the basis of an action of trespass *vi et armis*. There was nothing adverse to the plaintiff's rights, if he had any, in the Sheriff's action.

As to the sale, that, as the testimony and the Sheriff's return show, was of the "right, title, interest, and claim" only. It was at a distance from the place where the property was. Part of the latter was miles away, and no delivery was attempted to the purchaser.

The assignments of error that raise the questions discussed under the foregoing three heads (II., III., IV.) are the 10th, 11th, 12th, 13th, and 14th, none of which require any further notice, except that it may be observed, as to the 13th, that the answer goes considerably farther than the prayer, and as to the 14th, that, in affirming the point recited, the Court submitted to the jury a most complex question of law; for, the whole evidence bearing upon Hardesty's "right of immediate possession" being practically undisputed, there was nothing left to determine but the law resulting from the facts shown.

V. *Finally, it is contended, that, whether Hardesty, on December 16, 1878, had the right of possession of this property or not, and whether the levy was upon it or merely upon the company's right, title, interest, and claim, Hardesty was, at all events, estopped by the agreement of January 8, 1879, and the decrees entered in pursuance of the same, from maintaining an action of trespass against the defendant below. It is claimed that, by that agreement and the decrees referred to, Hardesty, as well as certain other parties to it, bound himself and consented to be bound to assert his rights to the rolling-stock, if any he had, by an action following the property itself in the hands of the purchasers of the road at the sales of January 2, 1879.*

This contention is based upon what is claimed to be the manifest intent of the parties to this agreement, as it is to be gathered from its four corners and the circumstances of the parties and subject-matter at the time.

The agreement (*ante*, pp. 19–21) starts out with a number of clauses beginning with "whereas." It thus recites the pendency of equity proceedings entirely foreign to the one in which the agreement is filed—the proceeding in which the S. & M. P. R. R. was sold by the Trustee under the first mortgage, on January 2, 1879—the sale, at the same time and place, of the road, &c., by the Sheriff—the entry of an appeal in the proceeding first above mentioned—the pendency of a motion to set aside the Sheriff's sale—the claim of title by Hardesty—the claim of title by the Connellsville Bank—the removal of the engine by its agents in violation of an injunction—and the pendency of the attachment proceeding. It then proceeds: "And whereas it is desirable that the relative rights of all parties interested or concerned should be determined at law, it is therefore hereby agreed"—that the appeal above mentioned, in another case, be withdrawn—that the Trustee's sale be confirmed—that the Sheriff's sale be confirmed—that the locomotive be handed over to the purchasers at these sales—that the rights of the bank to the locomotive "be determined in an action at law"—that the rights of Hardesty to the rolling-stock "be determined according to law," expressly saving any right he can establish to the same—that the contempt pro-

ceedings be dismissed—and that a decree be entered embodying the provisions of the agreement.

It thus appears that the agreement was intended to cover all the matters in controversy respecting this rolling-stock and the various proceedings in which these controversies arose, and to fix the status of the several claims put forth by suit or notice, and embarrassing the settlement of the question of possession of the road and property. The adjustment of the contempt proceedings was, as, indeed, is shown by its subordinate position in the recitals, merely incidental. The prime object was to put an end to cross-litigation. Such contracts are favorites of the law: *1 Parsons Contr.*, **438*, **439*, and especially so in the courts of this country: *Ibid.* It follows, that, in enforcing the methods adopted by the parties to such, a liberal construction will be given to the terms of the agreement, in order to effectuate its design. The method here adopted was to bring the rolling-stock within the reach of all the claimants—to give it into the possession of the only one of them that could use and keep it there, *i.e.*, the purchasers of the road—and, in order to enable them to do so, to ratify the proceedings culminating in the sales, and confirm the titles conveyed by them; reserving, however, to the parties claiming adversely to them and each other the right to assert their claims upon the property. To receive these assaults, and if they were successful, to pay the forfeit, was part of the undertaking of the party who obtained immediate possession. Beyond this, however, and as to all matters and rights of action arising out of the successive and complicated transactions incidental to the various proceedings recited in the instrument, a fair construction of it requires that the parties be held to have agreed *ut finis sit litium*. And as to the express reservations of rights of action, they must be governed by the principle *Inclusio unius est exclusio alterius*. It is to be observed that the reservation in the last clause, relating to Hardesty, reads as follows: "This agreement is not to prejudice any right he may *have and which can be legally established to* the rolling-stock." It does not read: "This agreement is not to prejudice any *right to the rolling-stock* that he may have and which can be legally established." In other

words, it is not any right in respect of the rolling-stock that he may have and that can be legally established, that is reserved, but only such as can be established directly *to* the rolling-stock. Moreover, the section, in its opening clause, saves to Hardesty merely the right to "determine" his "title or claim to the rolling-stock." It follows, that, the reservation being only of a right of action in respect of Hardesty's "title or claim to the rolling-stock"—only of an action the gist and purpose of which should be to "determine" the question of such right—and only in so far as his claim "can be legally established *to* the rolling-stock" itself, which, by the agreement is in the hands of the purchasers of the road, it must be deemed that any mere personal wrongs and grievances are definitively waived and abandoned. The property itself was the main subject of the convention, and it was to and upon the property only that the parties reserved any right of future claim. The action taken by the several parties to the agreement, and the proceedings had and the decrees made in pursuance of the same, estop each and all of them from any other course. The Connellsville Bank, the other claimant of the engine, so understood the agreement, and, in proper appreciation of its force and intended effect, brought its suit against the purchasers for the recovery of the property itself.

The fact that neither Hardesty nor Pile was actually a party of record to the suit in which it was made and filed, can surely be of no vital consequence. The suit was brought by Geo. F. Baer and others in behalf of the holders of the first mortgage bonds and in the name of such of them as might see fit to join. It is in evidence (*ante*, p. 8) that, in November, 1875, Hardesty received, as additional collateral for his advance to Coffroth, Sanner, and Uhl, $2000 of these first mortgage bonds. There is no evidence that he disposed of or returned them before January 8, 1879. The presumption is, that, on that day he was still the holder of those bonds; for, where a state of affairs, or a matter of fact, is once shown to exist, the presumption is that it still continues: *Brown vs. Burnham, 28 Me., 38; Brown vs. King, 5 Metc. (Mass.), 173; O'Neil vs. New York, etc., Mining Co., 3 Nev., 141; Bell vs. Young, 1 Grant (Pa.), 175; Farr vs. Payne,*

40 Vt., 615. In his capacity, then, as holder of these bonds, Hardesty was potentially and virtually a plaintiff in the bill. As the claimant of title to the subject-matter of the litigation, the rolling-stock, he could, at any time, upon his mere petition, have been made a party to the record. He was, and was recognized as, a necessary party to the agreement of January 8, 1879, for the purpose of making it the basis of a consentible decree. He made himself a party by joining in the agreement and assenting to the decree. Of course, that decree, as well as the agreement itself, must be regarded as conclusive upon him.

As to Pile, he was neither a party to the record, nor did he join in the agreement. He had, at that date, no such control over, or interest in, the rolling-stock, as would have made it proper for him to do so. Nevertheless, he was directly interested in its subject-matter. His name is mentioned in it and his action recited as one of the things to be provided for by its terms. Under the construction contended for, it distinctly operated as a benefit to him—a result which must have been in contemplation of the parties at the time. One of the incidents to Hardesty's claim of title in the rolling-stock was, that he might bring an action of trespass against the Sheriff for his levy upon it—no matter with what prospect of success or failure. To be relieved of this possibility was a direct benefit intended to accrue to Pile, by confining Hardesty's remedy to an action following the property in the hands of the purchasers of the road. The reservation of this right to Hardesty was a consideration for the relinquishment of the former remedy; for without that reservation, Hardesty, consenting to the transfer of the property to the purchasers, would have been precluded from reclaiming it from them. The effect of the agreement between Hardesty and the purchasers, as respects Pile, is, therefore, that of a promise by A to B for the benefit of C. In such a case, C may insist upon the performance of his promise by A: *1 Parsons Contr., *466–*468.*

It is, however, only in a technical sense, that Pile can be said not to be a party to this agreement. It is in evidence (*ante*, p. 15), that, in making the levy upon this property and locking the cars, the Sheriff was indemnified by the parties who subsequently be-

came the purchasers of the road. These parties, therefore, were themselves most deeply concerned in the release of whatever liability the Sheriff might have incurred in the premises. Not having obtained possession of the property under the sale, they were not liable to an action themselves by Hardesty, but they were exposed to the hazard of being compelled to pay its value, without any equivalent. Through the agreement, they obtained possession, and they also expressly made themselves liable to an action for the recovery of the property. They certainly did not intend to let the former liability on the indemnity bond remain in force, and incur an additional one in respect of the property. They, therefore, waived the immunity this agreement would have given them as to the latter; but this was by way of substituting it for the former. Now, these parties are parties to the agreement. They are also the real defendants in this case. Pile is merely a nominal defendant, their representative. There is certainly no rule of law that prevents the real defendant from setting up a defense through the nominal one, or that prohibits the latter from asserting a defense, or pleading an estoppel, in favor of the former, under his instruction. It is, therefore, improper to consider this agreement as *res inter alios acta*, and to deny to Pile the right of invoking it on the ground that he is, technically, a stranger to it.

The objection is now made that Hardesty himself was not a party to the agreement. It is signed by Ruppel and Hay as his attorneys. To escape its legitimate effect in barring the action against Pile, it is claimed, that, in signing the same, the attorneys exceeded—not their *actual* instructions; no evidence is adduced to show that—but the powers recognized by courts as within the generally accepted scope of an attorney's authority. On this ground it is asserted, with rather more meanness than cunning, that Hardesty is not bound by the act of his accredited representatives.

Whether or not an agent or attorney, in any given case, has exceeded his authority is a question of fact for the jury upon the evidence: *Drehman vs. Stiefel, 41 Mo., 184; Morris vs. Simpson, 21 Wend. (N. Y.), 610; Sheldon vs. Ins. Co, 25 Conn., 207; Refin. Co. vs. Bushnell, 88 Pa. St., 89; Hood*

vs. Adams, 128 Mass., 207; Twombly vs. Monroe, 136 Id., 464; Wood vs. Ry. Co., 59 Iowa, 196; Henderson vs. Terry, 62 Tex., 281 (whether attorney authorized to appear in a suit); *Kurrus vs. Mayo, 4 Ill. App. 106* (question of authority of attorney to make an agreement to dismiss a suit); unless the authority is given by writing, when it is to be measured by the terms of the employment as construed by the Court: *Nofsinger vs. Ring, 4 Mo. App. 576.* And for the jury also would have been the question of ratification of the attorney's act by Hardesty: *Burr vs. Howard, 58 Ga., 564,* which might very properly be inferred from the conduct of Hardesty and the length of the time elapsed before bringing this suit. The whole matter was, however, treated as a question of law by the Court below, and though, as appears from Hay's testimony, the employment of Messrs. Ruppel and Hay was by letter from Hardesty to them, that letter was not produced, nor is there anything whatever in the evidence to indicate that the terms of their employment were narrower, or that their authority under its terms was less comprehensive than that of lawyers generally when employed in cases of a similarly desperate character requiring prompt and authoritative action. All the evidence bearing upon the subject (*ante,* pp. 21–22), on the contrary, shows that Messrs. Ruppel and Hay were employed under the broad authority to "act for" Mr. Hardesty. And it is submitted that their action in signing for him the agreement in question was amply covered by an attorney's authority under such a commission.

The general rule is that the acts of an attorney are binding upon the client in the absence of fraud: *Church vs. McCarmack, 2 Md. Ch., 143; Thornbury vs. Macauley, Id., 425; Greenlee vs. McDowell, 4 Ired. Eq. (N. C.), 481; Sampson vs. Ohleyer, 22 Cal., 200; Lawson vs. Bettison, 12 Ark., 401; Chambers vs. Hodges, 23 Tex., 104.* And an attorney employed in anticipation of a suit, has just as much power to bind his client before as after the suit has been commenced: *Hefferman vs. Burt, 7 Iowa, 320.* If orders be given by a creditor to an attorney "to obtain immediate security" for a demand, the whole manner of doing it is left in the discretion of the attorney, and the creditor

is bound by his acts: *Rice vs. Wilkins, 21 Me., 558.* Agreements to go out of the regular course of proceedings, and to submit to arbitration or reference are uniformly held within the power of an attorney: *Cahill vs. Benn, 6 Binn. (Pa.), 99; Stokely vs. Robinson, 34 Pa. St., 315; Williams vs. Tracey, 95 Id., 308; Lee vs. Grimer, 4 Col., 185; Markley vs. Amos, 8 Rich. (S. C.), 468; Smith vs. Bassard, 2 McCord (S. C.), 406; Wade vs. Powell, 31 Ga., 1.* So, without special authority from the employer, to dismiss an action: *McLeran vs. McNamara, 55 Cal., 508.* So, to release from attachment the property of the debtor attached in the suit: *Monson vs. Hawley, 30 Conn., 51; Benson vs. Carr, 73 Me., 76; Moulton vs. Bowker, 115 Mass., 36.*

Nor will a compromise made by an attorney, even though without special authority, be interfered with, unless it is so unreasonable as to warrant the belief that the attorney was imposed upon or did not exercise his judgment fairly: *Potter vs. Parsons, 14 Iowa, 286; Roller vs. Woolridge, 46 Tex., 485.* Except where the sacrifice made is such that it is impossible to believe it to have been fairly made, a compromise by an attorney will bind the client: *Holker vs. Parker, 7 Cranch, 436.*

The question, then, as to the binding force of Ruppel and Hay's joinder in the agreement of January 8, 1879, if it was a question of law for the Court, would depend upon the reasonableness, fairness, and judiciousness, under the circumstances, of the arrangement so far as Hardesty is concerned. Upon this question, it is submitted, there can be no room for doubt, notwithstanding the remark of the learned judge below in his opinion (Record, p. 17) that it "did not in anywise benefit" Hardesty.

Without the agreement, what was Hardesty's position?

He claimed ownership of the engine and rolling-stock in use on the S. & M. P. R. R. at the time of the levy. Notice of his claim had been given the Sheriff only on the day of sale. It was at best questionable whether the levy had been made on the rolling-stock itself or only on the company's right, title, interest, and claim in and upon the same. At the time, the property had

been in a situation, which, it would be claimed with at least much reason, justified an absolute seizure. The Sheriff had sold only the right, title, interest, and claim of the company in and upon the rolling-stock and had attempted no delivery. The question whether Hardesty, under his claim of ownership, which, upon its face and in the light of surrounding facts and circumstances, was exceedingly precarious, could have any cause of action against the Sheriff, was, if not clearly negatived, at least fairly debatable. Against the purchasers of the road, on the other hand, who had not received or taken possession of the rolling-stock, there was no remedy, and by far the most valuable item, the engine, had been run off by an adverse claimant. To pursue it, would have been a laborious and expensive business to Hardesty; to pursue its captors, probably a losing speculation. The other rolling-stock he could not touch; for its removal was inhibited by an injunction.

Now, how did the agreement of January 8, 1879, affect this situation?

It surrendered the shadowy and doubtful remedy against the Sheriff. In exchange therefor, it brought back the engine within Hardesty's reach, placed it and the rest of the rolling-stock into the hands of a responsible party and gave Hardesty a right of action he had not before against this party to enforce his claim upon the rolling-stock. Regarding Hardesty merely in the light of a claimant of the rolling-stock, it is impossible to overlook the substantial and tangible advantages that accrued to him under this agreement, in exchange for the problematical rights he yielded up. But when it is remembered, that, as the holder of bonds secured by the first mortgage, to which the then absent engine was claimed to be subject, he had, even if his claim of title failed, a direct interest in its return—it is manifest that the provisions of the agreement of January 8, 1879, were most judiciously and advantageously adopted for Hardesty by the attorneys that represented him. It follows, that the only ground upon which, if established, it would lie in Hardesty's mouth to repudiate their action, viz., as unreasonably disastrous and unfair to him, utterly fails of substantiation from the facts of the

case, and there is, therefore, no room for denying to the agreement the force contended for.

The questions discussed under this head are raised by the 15th assignment of error.

S. A. Endich,

Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States,

No. 195, October Term, 1886.

GEORGE W. PILE,

PLAINTIFF IN ERROR.

VERSUS

RICHARD S. HARDESTY,

DEFENDANT IN ERROR.

PAPER BOOK OF DEFENDANT IN ERROR.

H. W. WEIR,
W. H. RUPPEL,
Attorneys for Defendant in Error.

PITTSBURGH:
A. A. ANDERSON & SON, BOOK AND JOB PRINTERS, 99 FIFTH AVENUE
1887.

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COUNTER STATEMENT.

The 21st rule of this court requires that the brief of the plaintiff in error shall contain, *inter alia, a concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.*

The statement of the case by the learned counsel for the plaintiff in error covers thirty pages.

Viewing its length and character in the light of the rule referred to it is quite difficult to say that it is a compliance with its requirements.

For this infraction the learned counsel pleads by way of excuse and justification what he calls the "complex nature of the transactions and occurences of which the case is the outgrowth."

But we are unable to see the complexity of which he complains. Viewed from a common sense standpoint we think the case is a plain and simple one.

There is no uncertainty or confusion, either as to the law or the facts which govern it, except that which has been most industriously and persistently cast upon it by the statements and arguments of the counsel for the plaintiff in error. He has quoted isolated parts of the testimony of the witnesses in such way as only serves to keep from view the real import of their evidence.

We regret that we cannot for these reasons give our assent to a large portion of his statement of the case.

Briefly and succinctly narrated the facts are these:

The first Somerset & Mineral Point Railroad Company was incorporated by an Act of the General Assembly of the State of Pennsylvania, approved March 17, 1868, under that corporate name. Sometime after the company was organized the road was built and ready for operation, except as to rolling stock.

On the 3d day of June, 1871, the company issued coupon bonds to the amount of $50,000, bearing interest from date. To secure payment of these bonds the company at the same time placed a mortgage on all the property, real and personal, it then owned, and all that which it might acquire in the future.

Afterwards, on the 22d of January, 1872, the company made a further issue of bonds of like character to the amount of $30,000, and on the same day placed another mortgage on the same property, similar in terms to the first, to secure payment of the second issue of bonds.

This company never owned any rolling stock. It operated the road from the time of completion until the 1st of December, 1874, with rolling stock leased from the Pennsylvania Railroad Company.

On the aforesaid 1st day of December, 1874, the road and all the property belonging to the company, real and personal, were sold at trustee's sale, upon proceedings regularly had upon the second mortgage, for non-payment of interest thereon. This sale was made subject to the lien of the first mortgage.

At this trustee's sale A. H. Coffroth, Esq., bid the property in at the sum of $22,050 in his own name, but purchased for the benefit of himself, John H. Uhl, Esq., and M. A. Sanner, and immediately transferred one-third thereof to each of his said co-vendees, and the three paid the aforesaid purchase money.

Afterwards, on the 8th day of February, 1875, these purchasers obtained a charter and organized a new company under the provisions of the Act of the General Assembly of the State of Pennsylvania, approved April 8th, 1861, and the supplement thereto of February 19, 1867.

The material parts of these several Acts of Assembly are correctly recited on the first and second pages of the plaintiff in error's brief.

The corporate name of the new company was made the same as the corporate name of the old company, to wit, "The Somerset &

Mineral Point Railroad Company." But though they bore the same corporate name they were separate and distinct corporations, both in law and in fact.

The new company took possession and operated the road from its organization until the latter part of March, 1875, with rolling stock leased from the Pennsylvania Railroad Company by the new company, the same as the old company had done during the time it owned and operated the road.

The Pennsylvania Railroad Company having refused to extend the lease of its rolling stock to the new company beyond the month of March, 1875, and the new company not having the necessary means to supply it by the purchase of other stock, and having to meet the interest on the first mortgage bonds of the old company, and being at the same time indebted to Coffroth, Uhl and Sanner in the sum of $22,050, for their original purchase money, found the new corporation at this period of its history in rather a depressed financial condition.

With a view to relieve the company from this embarrassment its board of directors resolved, on the 6th day of March, 1875, to issue coupon bonds of the company to the amount of $45,000, of the denomination of one hundred dollars each, payable on the first day of May, 1885, bearing interest at the rate of seven per cent. per annum from the first day of May, 1875; and to secure the payment thereof by a mortgage upon the road, its franchises and property, real and personal, acquired and to be acquired.

Afterwards, on the 13th day of March, 1875, in pursuance of this resolution, the company issued the bonds and executed the mortgage in the amount named upon the terms and conditions above stated.

These bonds were applied as follows, to wit:

Coffroth, Uhl and Sanner proposed to take $21,000 of them in full satisfaction of the $22,050, which the company owed them for their original investment in the purchase of the road, and, this offer being accepted, the company delivered $7,000 of them to Coffroth, and a like amount to Uhl and Sanner each.

This left a balance of $24,000 of the bonds still belonging to the company which was retained by the company in its treasury for the purpose of realizing, by a sale thereof, money sufficient to purchase rolling stock to equip and operate the road.

The financial credit of the company not being of the highest order at that time, and these bonds being second mortgage bonds, they did not find a ready market.

This source of revenue was therefore not available in time to meet the demands of the company for engines, cars, &c., necessary to operate the road. And the Pennsylvania Railroad Company having refused to extend the lease of its rolling stock to the new company beyond the month of March, as before stated, the company found itself in a perplexing situation.

Under these pressing circumstances Coffroth, Uhl and Sanner came to the front, and individually purchased and paid for, out of their own funds, the rolling stock in controversy in this suit at a cost of $14,400, and offered to let the new company have the use of it for the interest of its original cost and to keep in repair by way of rent, they reserving the right to take possession and remove it at any time they saw proper to do so. This was agreed to by the company, and this arrangement was to continue until the company could realize by sale of its aforesaid bonds, or from the earnings of the road, funds sufficient to purchase the property. When this would be accomplished then Coffroth, Uhl and Sanners were to sell and transfer the rolling stock to the company.

The company being unable to realize, from either of these sources, money enough to buy and pay for it, this arrangement was extended and the company continued to use the property on the road under the terms and conditions above named from March, 1875, the time Coffroth, Uhl and Sanner put it upon the road, until December, 1878, when it was taken possession of by the plaintiff in error as hereafter stated.

In December, 1875, Coffroth, Uhl and Sanner, as individuals, borrowed $15,000 from R. S. Hardesty of the city of Baltimore, the plaintiff below and defendant in error.

For this they gave their joint and several obligations payable two years after date with interest. At the same time they placed in his hands $21,000 of coupon bonds, as collateral security for the payment thereof. These were the same bonds which they had previously received from the new company, in payment of the $22,050 which it owed them for the purchase of the road as aforesaid, and were their own individual property.

Sanner being then the owner in his own right of $2,000 of the first mortgage bonds of the old company's issue of $50,000, placed them also in Hardesty's hands as an additional collateral, together with $5,000 of the new company's bonds, being part of the $24,000 which had been set apart in the treasury of the new company for the purpose before stated.

Thus Hardesty held as collateral coupon bonds amounting in all to $28,000.

These collaterals were all the individual property of Coffroth, Uhl and Sanner, except the $5,000 of treasury bonds which belonged to the new company, as above mentioned.

Afterwards, in December, 1877, and a few days after the maturity of Coffroth, Uhl and Sanner's bond to Hardesty, Coffroth and Uhl called upon Hardesty in Baltimore with a view to procure an extension of payment of it, they having in the meantime acquired Sanner's interest in the rolling stock by assuming payment of his part of the Hardesty debt.

At this interview they succeeded in procuring the extension desired by agreeing to sell and transfer to Hardesty the rolling stock in controversy in this suit as an additional collateral security for the payment of his bond, he having the right to take the actual possession of the property whenever he saw proper to do so.

This transfer was made expressly subject to a lien of $1,500, which Coffroth, Uhl and Sanner owed on the engine, and was to be reduced to writing and delivered to Hardesty as evidence of his title and ownership whenever he required it.

On the 20th day of November, 1878, Hardesty, by his attorney, A. J. Colburn, Esq., called upon Coffroth and Uhl, in Somerset, Pennsylvania, in relation to the matter, and on that day they, in pursuance of the agreement of 1877, upon which Hardesty extended payment, executed the following bill of sale, for the purposes aforesaid:

"For value received we hereby sell, transfer and set over to R. S. Hardesty, of the city of Baltimore, one engine, (letter A), subject to a lien of $1,500, one passenger car, one car used for baggage and passengers, and two gondolas, being the rolling stock now in use on the Somerset and Mineral Point Railroad.

"The said rolling stock to be appraised by competent persons, and the value thereof to be credited on the bond of A. H. Coffroth,

M. A. Sanner and John H. Uhl. Witness our hands and seals this 20th day of November, 1878.

"A. H. COFFROTH. [SEAL.]
"J. H. UHL. [SEAL.]"

On the day of the date of this bill of sale Coffroth and Uhl mailed it at Somerset, Somerset county, Pennsylvania, to Hardesty at Baltimore, who received it the following day.

On the 30th day of September, 1878, Geo. F. Baer obtained a judgment in the name of John Roth, for his use, against the Somerset & Mineral Point Railroad Company, at No. 518 of August Term, 1878, in the Court of Common Pleas of Somerset County, Pennsylvania, for the sum of $1,081.29, being for interest due on some of the first mortgage bonds issued by the original corporation, the old company.

On the 25th day of November following, Baer, the equitable plaintiff, issued execution on this judgment; and on the 16th day of December, 1878, the Sheriff made and endorsed upon the said writ the following levy:

"By virtue of the within writ I went to the respective offices * * * and demanded payment. * * * Payment thereof has not been made. And I have, therefore, by virtue of the same written writ, levied upon the right, title, interest and claim of the S. & M. P. R. R. Co., of, in and to the Somerset & Mineral Point Railroad in Somerset county, Pa., and upon all property, real and personal and mixed, including locomotives, cars, hand cars, tools, engine houses, depot, water station, siding and switches now in regular use of said railroad company in the conducting of its business as a carrier, and the rights, franchises, privileges and rights of way of said company, incident, appurtenant or in any wise appertaining or connected therewith.

Dec. 16, 1878. "GEO. W. PILE, *Sheriff*."

This levy included the rolling stock in controversy and the identical property described in the bill of sale of Coffroth and Uhl to Hardesty, of November 20th, 1878.

The Sheriff took the actual possession and locked the cars and kept them locked until he sold them.

Having received notice of Hardesty's claim to the property he demanded indemnity, and Geo. F. Baer, the equitable plaintiff in the execution, Wm. M. Hall and C. Long executed and delivered to him their bond, to save him harmless against Hardesty's claim.

On the 2d day of January, 1879, and before the sale, the following written notice was served on the Sheriff, the defendant in error:

"*To Geo. W. Pile, Sheriff of Somerset County:*

"You are hereby notified not to sell the following rolling stock on the Somerset & Mineral Point Railroad, to wit: one passenger car, one passenger and baggage car combined, two gondolas, and one engine (marked A,) as I am the owner of the said passenger car, passenger and baggage car, the two gondolas, (and the engine, subject to the payment of $1,500—due W. K. Bailey & Co. or their assigns.) Jan. 2, 1879. "RICHARD S. HARDESTY.

"By his attorneys,

"W. H. RUPPEL and VAL. HAY."

But, notwithstanding this notice, the Sheriff, being indemnified by Hall, Baer and Long, the parties interested, proceeded with the sale, and sold the property in dispute to Long for the sum of $20, and thereupon unlocked the cars and delivered possession to him, and made the following return, to wit:

"January 2, 1879, all the right, title, interest and claim of the Somerset and Mineral Point Railroad, in Somerset county, and State of Pennsylvania, and all property, real, personal and mixed, including locomotives, cars, hand cars, tools, engine houses, depots, water stations, siding and switches, as held by the said Somerset and Mineral Point Railroad Company in the conducting of its business as a carrier, and all the rights, franchises, privileges and right of way of said company, incident or appurtenant, or in anywise appertaining or connected therewith, sold to Christian Lang, for the sum of twenty dollars, of which $18.25 was applied to costs, Sheriff, for all costs but attorney's fee. "GEO. W. PILE, *Sheriff.*"

On the 9th, 10th and 11th pages of his statement of the case, the learned counsel for the plaintiff in error seems to have taken great pains to give at length what he alleges to be true copies of certain reports of the President and Treasurer of the S. & M. P. R. R. Co. to the Auditor General of the State of Pennsylvania in regard to the ownership of this rolling stock, but at the same time takes special care not to give in detail the testimony of those officers, wherein they denied the correctness of these alleged copies and pointed out the errors which they contained, and testified clearly and positively that the S. & M. P. R. R. Co. did not own the rolling stock on the road, but on the contrary, it belonged absolutely to Coffroth, Sanner and Uhl, individually, as before stated.

Afterwards, on the 19th day of November, 1881, Hardesty brought this action against the Sheriff in the Circuit Court of the United States, in the Western District of Pennsylvania, at No. 2 of May Term, 1882, to recover the value of the property alleged to have been thus wrongfully taken from him.

The plaintiff declared in trespass *vi et armis de bonis asportatis.* To this the defendant pleaded not guilty, and thus the issue was made up.

On the trial below the plaintiff, to maintain the issue on his part, gave a large amount of evidence tending to prove his title and his right to the immediate possession of the property in dispute through Coffroth, Uhl and Sanner.

The defendant, to maintain the issue on his part, gave evidence tending to prove title and ownership to the property in the S. & M. P. R. R. Co.

The testimony introduced on both sides was fairly submitted to the jury by the learned judge who presided at the trial, with proper instructions as to the law applicable to the case, as will appear by reference to his charge.

The jury, by their verdict, found the facts substantially as narrated in the foregoing statement of the case.

ARGUMENT FOR DEFENDANT IN ERROR.

The counsel for the plaintiff in error complains that the learned and able judge who tried this cause in the court below committed fifteen errors. His printed argument to prove this is quite elaborate; it is twenty-nine pages long.

Much of it would be appropriate and perhaps entertaining if addressed to a jury; but its pertinence in a court of ~~equity~~ is not so clear.

We shall not undertake to follow it through all its meanderings or divisions, sub-divisions, &c., into which it is divided and subdivided with so much skill and ability.

The order of its arrangement is so finely drawn that it tends more to confuse and darken than to enlighten and lead to a correct understanding of the case.

On the trial in the court below it was admitted on both sides that the old S. & M. P. P. R. Co. never owned any rolling stock.

But the defendant claimed that when the rolling stock in dispute was put upon the road by Coffroth, Uhl and Sanner, the new S. & M. P. R. R. Co. had a certain "proprietary interest or property in it," resulting from certain negotiations between it and Coffroth, Uhl and Sanner, looking to a purchase of the property by the new company, and that it thereby became subject to the $50,000 mortgage against the old company, under that provision of the mortgage which made it a lien upon after acquired property of the company.

When touching upon this point the learned judge in his charge to the jury on the trial below, said:

"And here, to guard the jury against possible misapprehension, it is proper for me to say that the $50,000 mortgage of the old company, while a continuing lien upon the railroad itself, did not attach to or bind this newly acquired rolling stock. Whether that rolling stock belonged to the new company or to Coffroth, Uhl and Sanner, as individuals, it was not bound for that mortgage debt." *Vide* record, page 11.

Under the evidence and charge of the court, the jury found for the plaintiff. The defendant moved for a new trial and assigned this part of the charge, *inter alia*, as a reason.

On the argument of this motion, the learned counsel for the defendant again pressed this point upon the attention of the court with renewed vigor, but the court, after carefully reconsidering the question, said:

"We cannot give our assent to the proposition that the rolling stock in question was bound by the first mortgage of the first corporation. That the company never owned any rolling stock and none passed to the purchaser of the railroad at the sale under the company's second mortgage. The locomotive and cars were acquired after that sale and after the incorporation of the second company. Moreover, the jury have found that they were not the property of the second company, but were purchased and owned by Coffroth, Uhl and Sanner, and that their title became vested in the plaintiff before the trespass complained of. It is true the first mortgage in terms covered the "future to be acquired" rolling stock of the company, and doubtless it would have attached to engines and cars subsequently acquired by the mortgagor and placed upon the road.

"But none of the cases relied on by the learned counsel give countenance to the notion that such mortgage grasped the rolling stock of third persons temporarily used upon the railroad under a contract between them and a company subsequently operating the road. Such rolling stock does not become fixed to and part of the railroad." *Vide* record, page 15.

In view of the decisions of this court the soundness of this ruling cannot be doubted.

United States vs. New Orleans Railroad, 12 *Wall*, 362.

"Was a suit instituted by the United States as the holder of a number of the first and second mortgage bonds of the New Orleans & Ohio Railroad Company against that company, and one Trimble, trustee of them, to foreclose the mortgages given to secure the said bonds. These mortgages were executed in 1858 and 1860, respectively, and covered all the company's property of every kind, with a stipulation to include also all future acquired property.

"The trustee of the mortgages and several individual bondholders were made parties, and the bill contained proper allegations as to the impracticability of making all of them parties. After a final decree of foreclosure and sale, and whilst the execution was in the hands of the Marshal, it transpired that a portion of the rolling stock, consisting of two locomotives and ten cars, had been sold to

the railroad company by the United States in 1866, and that simultaneously with the sale the company gave to the United States a bond for the purchase money, wherein it was stipulated that the latter should have a lien therefor upon the property sold, and that the company should not sell it or part with it, until payment of the price, without the written consent of the United States. Hereupon plaintiff and defendant directed the Marshal not to sell the said locomotives and cars. The rest of the property was sold, but brought less than the amount of the mortgage bonds.

"The parties then filed a written statement of the facts in relation to said locomotives and cars, adding to what is above stated the further fact that the bond given for the purchase money thereof was not recorded, and that its contents were unknown to all the bondholders of the railroad company except W. Trimble, the trustee of the mortgages. Upon this statement the question whether the United States had a superior equity in this property to that of the bondholders, under the mortgages, was submitted to the court for its decision, and the court decided that they had a superior equity, and made a decree to that effect."

On an appeal to this court the decree was affirmed. His Honor, Justice Bradley, in delivering the opinion, *inter alia*, said:

"The appellants contend * * * * * * the mortgages being prior in date to the bond given for the purchase money of these locomotives and cars, and being expressly made to include after acquired property, attached to the property as soon as it was purchased and displaced any junior lien.

"This, we apprehend, is an erroneous view of the doctrine by which after acquired property is made to serve the uses of a mortgage.

"That doctrine is intended to subserve the purposes of justice and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after acquired property can only attach itself to such property in the condition in which it comes into the mortgagors hands.

"If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.

"It only attaches to such interest as the mortgagor acquires; and if he purchases property and gives a mortgage for the purchase

money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment, or recognizance can displace such a mortgage for purchase money. * *

"Had the property sold by the government to the railroad company been rails, as in the case of the Galveston Railroad Company vs. Cawdrey, or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad company itself, are unaffected by a general prior mortgage given by the company and paramount thereto."

In Fosdick vs. Schall, 9 *Otto*, 251, his Honor, Chief Justice Waite, in delivering the opinion of the court, re-affirmed this doctrine, with emphasis. In touching upon this question he said:

"The mortgage attaches to the cars if it attaches at all, because they are 'after acquired' property of the company; but as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquires; no more, no less. These cars were loose property, susceptible of separate ownership and separate liens, and such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto."

The doctrine of these cases is re-affirmed in Fosdick vs. Car Company, *ibid*, 256, and should now be recognized as settled law in regard to this question.

The theory, therefore, of the counsel for the plaintiff in error, that the rolling stock in dispute became subject to the lien of the first mortgage when put upon the road by Coffroth, Uhl and Sanner, when tested by the law as laid down in the cases cited, cannot prevail, and must be dismissed as unsound.

On the trial below Hardesty, the plaintiff, contended that Coffroth, Uhl and Sanner had purchased and paid for the rolling stock in dispute; that it was their own individual property; that they leased it to the new S. & M. P. R. R. Co. for a stipulated rent and put it upon the road in pursuance of this lease, reserving the right to resume the possession at any time they pleased. That afterwards

they sold and transferred the property to him with the right of immediate possession as collateral security for their indebtedness to him; and that at the time of the alleged trespass he had the legal title to the property and the right of immediate possession.

The defendant admitted ownership in Coffroth, Uhl and Sanner, but contended that they had sold the property to the new company, and that it was put upon the road and into the possession of the new company in pursuance of an absolute sale, and not under a lease, as asserted by the plaintiff.

The issue of fact thus raised was the leading feature of the trial.

A large amount of evidence was introduced by the plaintiff in support of his side, and a considerable amount was introduced by the defendant tending to prove his position.

The learned judge who presided at the trial, in his charge, presented to the jury this issue of fact with great clearness in the following language:

"The plaintiff claims, and he has given evidence tending to show, that the rolling stock, the subject of this controversy, was purchased by Coffroth, Uhl and Sanner, individually and for themselves; that they gave their personal obligations for the price; that the rolling stock was delivered to them, and was their individual property; that they permitted the new company to use it upon the road for a compensation; but reserved to themselves the right to resume possession thereof at any time they saw proper to do so.

"Whether the rolling stock was the individual property of Coffroth, Uhl and Sanner, or was the property of the new railroad company, the corporation, is the fundamental question in this case.

"If it belonged to the corporation the plaintiff, of course, can not recover, for he claims title, not under the corporation, but under Messrs. Coffroth, Uhl and Sanner. To whom then did this property belong?" *Vide* record, page 11.

The jury, upon a careful consideration of this question, in the light of the evidence on both sides, by their verdict answered that it belonged to the plaintiff and not to the new company.

The learned counsel for the plaintiff in error asserts in his printed argument that the second S. & M. P. R. R. Co. acquired a certain proprietary interest or property in the rolling stock in dispute and that this fact was "established by unconflicting testimony."

In this broad assertion he is clearly mistaken. The learned judge, on the trial below, submitted this branch of the case to the jury in the following language:

"A. H. Coffroth, John H. Uhl and Michael A. Sanner have severally testified at length upon this whole subject, and they respectively state that this rolling stock was purchased, paid for and owned by them individually, and that it was used by the corporation under the arrangement alleged by the plaintiff.

"Peter Heffly and Noah Roberts, who were directors of the new company, testify that at the first meeting of the board of directors after the rolling stock was acquired Gen. Coffroth, who was the president of the company, stated to the board that the rolling stock belonged to Coffroth, Uhl and Sanner, and the terms upon which they were willing the company should have the use of it; and these two witnesses add, that they understood the rolling stock was the individual property of Coffroth, Uhl and Sanner, and was used by the company under the alleged arrangement.

"Upon this branch of the case the defendant places great reliance upon certain minutes of the company, upon which counsel have commented, the action of the railroad company and of Coffroth, Uhl and Sanner in respect to the new company's mortgage of $45,000, and the bonds intended to be secured thereby, a report of General Coffroth, as president of the company, to the stockholders, and several annual reports, four in number, made by the officers of the company to the Auditor General; and it is strenuously insisted by the defendant's counsel that the acts of the company, and of Coffroth, Uhl and Sanner, and the statements made in the documents referred to, are inconsistent with the plaintiff's theory as to the ownership of the rolling stock, and contradictory of the testimony of Coffroth, Uhl and Sanner. All this, however, is denied by the plaintiff's counsel. * * * * * What credit shall be given to the witnesses it is for the jury to determine. If any of them have any personal interest in the controversy, that is a matter which may go to their credibility, and is for your consideration. You have seen and heard the witnesses, and it is for you to say whether they have testified truly or falsely.

"Upon the whole evidence in the case you will determine whether the ownership of the property in question was in the corporation or in Coffroth, Uhl and Sanner."

The jury, upon a full and careful consideration of the evidence on both sides, aided by this clear and impartial charge, found that the new company had no interest or ownership, "proprietary" or any other kind, great or small, in the rolling stock in dispute.

The plaintiff in error further claims "that in this case the Sheriff's levy was, in point of fact and law, not upon the property itself, but upon the right, title, interest and claim of the S. & M. P. R. R. Co. in and upon the same."

The levy is in these words:

"By virtue of the within writ I went to the respective offices * * * and demanded payment. * * * Payment thereof has not been made. And I have, therefore, by virtue of the same written writ, levied upon the right, title, interest and claim of the S. & M. P. R. R. Co. of in and to the Somerset & Mineral Point Railroad, in Somerset county, Pa., and upon all property, real, personal and mixed, including locomotives, cars, hand cars, tools, engine houses, depot, water station, siding and switches, now in the regular use of said railroad company in the conducting of its business as a carrier, and the rights, franchises, privileges, and rights of way of said company, incident, appurtenant or in any wise appertaining or connected therewith.

"December 16, 1878. "GEO. W. PILE, *Sheriff.*"

Before the sale the Sheriff, plaintiff in error, was served with the following written notice:

"*To Geo. W. Pile, Sheriff of Somerset Co.:*

"You are hereby notified not to sell the following rolling stock on the Somerset & Mineral Point Railroad, to wit: one passenger car, one passenger and baggage car combined, two gondolas, and one engine, marked 'A,' as I am the owner of the said passenger car, passenger and baggage car, the two gondolas, (and the engine, subject to the payment of $1,500, due W. K. Bailey & Co., or their assigns.) Jan'y 2, 1879. "RICHARD HARDESTY.

"By his Attorneys,

"WM. H. RUPPEL and VAL. HAY."

The plaintiff below called Geo. W. Pile, the defendant, as for cross-examination under the Pennsylvania statute. His testimony as to the actual siezure is as follows;

"*Q. You are the defendant in this case?*

"*A. Yes, sir.*

"*Q. You are Sheriff of Somerset county?*

"*A. I was.*

"*Q. Will you state, sir, whether you had a writ in your hands in* 1878?

"*A. I had.*
"*Q. You made a levy in pursuance of that writ?*
"*A. Yes, sir.*
* * * * * * *
"*Q. Now do you pretend to say that you don't know whether you levied upon this rolling stock or not?*
"*A. There was a levy made upon the road and all the right, title, interest and claim of the Somerset & Mineral Point Railroad Company.*
"*Q. Don't you know that those cars were locked?*
"*A. I know these cars were locked.*
* * * * * * *
"*Q. Did you lock them by virtue of the writ you had in your hands?*
"*A. Yes, sir.*
"*Q. What writ was it?*
"*A. Geo. F. Baer for use against the Somerset & Mineral Point Railroad Company.*
* * * * * * *
"*Q You required a bond of indemnity?*
"*A. I did.*
"*Q. Who gave you the bond?*
"*A. It was handed to me by my attorney, General Kountz.*
"*Q. Who were the bondsmen?*
"*A. Wm. M. Hall, Christian Long and Geo. F. Baer.*
* * * * * * *
"*Q. They directed you to execute the writ?*
"*A. I was directed by their attorney, W. J. Baer.*
"*Q. And in pursuance of that you locked the cars?*
"*A. Yes, sir.*
* * * * * * *
"*Q. How long did you keep them in your custody in that way?*
"*A. They were locked until after the sale.*
* * * * * * *
"*Q. If I understood you, you subsequently sold them by virtue of the writ in your hands?*
"*A. Yes, sir.*
"*Q. After you sold to Mr. Long did you unlock the cars for him?*
"*A. Yes, sir; they were unlocked, yes, sir; I don't know who done it, but they were unlocked by my orders.*

After the defendant sold and delivered the property he made the following return upon the writ:

"Jan'y 2, 1879, all the right, title, interest and claim of the Somerset & Mineral Point Railroad, in Somerset county and State

of Pennsylvania, and all property, real, personal and mixed, including locomotives, cars, hand cars, tools, engine houses, depots, water station, siding and switches, as held by the said Somerset & Mineral Point Railroad Company in the conducting of its business as a carrier; and all the rights, franchises, privileges and rights of way of said company, incident and appurtenant, or in any wise appertaining or connected therewith, sold to Christian Lang for the sum of $20, of which $18.25 was applied to costs of Sheriff, for all costs but attorney fee. "GEO. W. PILE, *Sheriff.*"

But to sustain this action proof of actual seizure was not necessary.

"Where a Sheriff, disregarding a notice of title given to him, proceeds to sell the goods of a stranger to the execution, his return to the writ that he had affected such sale is conclusive upon him, and neither manual taking, occupation or removal is necessary to render him liable in trespass to the owner of the goods."

Freeman, *et ux*, vs. Apple, 99 *Pa.*, 261.
Welsh vs. Bell, 32 *Pa.*, 16.
Paxton vs. Steckel, 2 *Pa.*, 93.
Wintsinghan vs. Lafay, 7 *Cowen*, 731.
Freeman vs. Apple, 39 *Leg. Int.*, 180.

"An assignment of chattels by which the right of possession passes, draws after it the constructive possession, which will support trespass."

North vs. Turner, 9 *S. & R.*, 244.
Hower vs. Geesman, 17 *Ibid.*, 257.
Myers vs. White, 1 *Rawle*, 353.

A pledgee of goods may maintain trespass against a wrong doer, and recover the whole value of goods in damages, being liable to account to the pledgor.

Lyle vs. Barker, 5 *Bin.*, 457.
Strodes vs. Cowan, 3 *Watts*, 258.

Did the property and the right of immediate possession to the rolling stock in dispute vest in Hardesty, the plaintiff below, by the bill of sale of 20th November, 1878, and had he such ownership and right of immediate possession at the time of the alleged trespass.

The jury found that he had, and the only question before this court is, did the jury so find under proper instruction?

The charge of the court to the jury on this point, on the trial below, was in these words:

"It is shown, if the testimony is believed, (and it is uncontradicted), that these persons, (Coffroth, Uhl and Sanner), borrowed from the plaintiff a large sum of money, from $13,000 to $15,000, for which they gave their bond. It is testified that this money so borrowed from the plaintiff, or part thereof, was applied by Coffroth, Uhl and Sanner to pay their obligations given for this rolling stock. There is evidence to show that on November 20, 1878, Coffroth and Uhl, (who, it would seem, had then succeeded to Sanner's right), mailed to the plaintiff, at Baltimore, the writing in evidence, dated November 20, 1878, whereby Coffroth and Uhl sold, transfered, and set over to the plaintiff this rolling stock.

"That transfer, it is testified by the plaintiff, was made to and accepted by him 'as further security behind their (Coffroth, Uhl and Sanner's) bond.'

"Whatever right these individuals had in this rolling stock passed by the paper of Nov. 20th, 1878, to the plaintiff. * * * And if you find from all the evidence in the case, that at the time of the levy the right of property in and to said rolling stock was in the plaintiff, and that he had the right to the immediate possession thereof, the defendant was a trespasser, and the plaintiff is entitled to recover damages."

The correctness of this instruction, viewed in the light of the evidence and the law applicable to the case, we think cannot be doubted.

The fifteenth and last assignment of error complains that the court erred in not charging the jury as requested by the defendant:

"That the agreement of 8th of January, 1879, under which the possession of this rolling stock was decreed by the court to be delivered to the purchaser at the Sheriff's sale estops the plaintiff from suing the Sheriff in trespass *vi et armis*."

To show that this point was properly refused we refer to the opinion of the court below in overruling the motion made by the defendant below for a new trial. In disposing of this reason for a new trial the learned Judge said:

"The defendant contends that the court erred in refusing to charge that the agreement of January 8th, 1879, estopped the plaintiff from sueing the Sheriff in trespass. But if the construc-

tion which the defendant claims for that instrument be the true one it might well be doubted whether Messrs. Ruppel and Hay, in their mere capacity as attorneys, could bind the plaintiff by their signature."

Halker vs. Parker, 7 *Cranch*, 436.
Gaible vs. Blaine, 1 *P. and W.*, 264.
Willis vs. Willis, 12 *Pa. St.*, 150.
Stokely vs. Robinson, 34 *Pa. St.*, 315.

The agreement did not in any wise benefit the plaintiff, and was made in an equity suit, (as the basis of a decree therein), to which he was an entire stranger, and in which he had no interest, nor had he any concern with the rule for an attachment for contempt, the pendency of which was the occasion of the agreement. Moreover the defendant (the Sheriff) was no party to that suit or to the agreement.

It is then very questionable under the decisions whether Messrs. Ruppel and Hay, without special authority so to do, could thus release or destroy the plaintiff's right of action against the defendant.

But the paper does not profess so to do, and we think it is not fairly open to a construction which would produce that result.

The parties to the agreement were not dealing with any question between the plaintiff and the defendant.

The main purpose in view was to prove a contempt of court and secure a return of the locomotive which had been run off by Newmyer and McCaleb under a claim of right, but in violation of an injunction.

The sixth clause of the agreement declares: "The rights of R. S. Hardesty to any title or claim to the rolling stock, if he has any legal right, shall be determined according to law. This agreement is not to prejudice any right he may have, and which can be legally established, to the rolling stock."

The whole paper is to be read in the light of the concluding paragraph of the preamble, viz:

"'And whereas, it is desirable that the relative rights of all parties interested or concerned should be determined at law.' This furnishes the key to the true intention of the parties. A consentable decree was to be entered in the equity suit, and all parties left to their legal remedies. In our opinion it would be a perversion of the agreement to hold that it bears the plaintiff's action against the Sheriff for this trespass." (Record, pp. 16 and 17.)

That the court construed this agreement properly there can be no doubt, and we do not deem it necessary to add anything to the reasoning of the learned judge upon the subject.

We therefore respectfully submit that the judgment should be affirmed.

H. W. WEIR,
W. H. RUPPEL,
Attorneys for Defendant in Error.